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### APPEAL.

1. The loss of an appeal bond being established, secondary evidence, either written or oral, may be introduced to prove the alleged signature of the defendant to the bond as surety.

*Cincinnati Insurance Company v. Harrison et al.*, 1.

2. Where, on the third of December, 1872, judgment was rendered by the Eighth District Court, parish of Orleans, dissolving the injunction granted by that court, and dismissing the suit, and said judgment was not signed until the second of January, 1873, after the case was transferred to the Superior District Court recently created, and where on appeal a motion was made to dismiss the same on the ground that the judgment rendered did not require signature, and no appeal could therefore be taken after the lapse of ten days from its rendition: Held—That the judgment dissolving the injunction and dismissing the suit was a final one, and no appeal could be taken from it until it was signed, which was on the second of January, 1873, and that the appeal was properly made returnable within ten days from that date. *State v. Wharton et al.*, 2.

3. Where the affidavit of the appellant declares that, as a member of the State Election Returning Board, his pecuniary interest in the suit exceeds one thousand dollars, and where a reference to act No. 72 of 1871, p. 152, shows that an appropriation was made for the compensation of the same returning officers: Held—That this mode of establishing an appealable interest under such circumstances is fully sanctioned by our jurisprudence. *Ibid.*

4. Where the matter in dispute involved in the suit is such as to demand or authorize the action of this court, the right to appeal is granted by article 571 C. P. to third persons who allege that they are aggrieved by the judgment rendered in a suit between other parties. The law does not say that such judgment shall be *res judicata* against the third persons to entitle them to appeal. *Ibid.*

5. The appeal must be sustained where, as in this case, the appellant has made the requisite allegations supported by his affidavit, and has made it apparent that he is aggrieved by the judgment appealed from, which annuls the authority by which he was declared to be elected Attorney General of the State, whose salary is five thousand dollars per annum, and sets aside the return of the election board which is the foundation of his title to office.

*Ibid.*

## APPEAL—Continued.

6. Where it was alleged that appellant had no interest to appeal on the ground that the Returning Board had exercised its authority on his behalf and was *functus officio*: Held—That appellant had an interest to have it decreed that the Board of Returning Officers was legal at the time it declared his election. *Ibid.*
7. The objection that full ten days was not allowed in this case to bring up this appeal is without force. The law directs that in such cases the appeal shall be returnable within ten days after the judgment of the lower court. The return day may be less, but not more than ten days. *Ibid.*
8. An appeal will not be dismissed because the surety on the appeal bond was surety on the injunction bond. If the bond of appeal fixed by the judge *a quo* is insufficient for a suspensive, it suffices for a devolutive appeal.

*Moussier & Courcelle v. Gustine & Sauvinet*, 36.

9. Where a suit is by a stockholder of a company to compel the officers to permit him to examine the books of the company, and there is no amount in dispute which could give the court jurisdiction, the appeal will be dismissed.

*State ex rel. Newgass v. Friedlander, President*, 43.

10. Where the court is without jurisdiction *ratione materiae* to try a case, it must notice this fact of its own accord, and the appeal will be dismissed. *Cons. art. 74.*

*McClelland v. New Orleans Sugar Shed Co.*, 74.

11. On a motion to dismiss an appeal on the ground that the matter in dispute does not exceed five hundred dollars, the amount of defendant's liabilities on a stock note as stockholder in a company will determine the jurisdiction of the court, and not the percentage claimed thereon. It must be first ascertained if he is liable on the stock note itself, as alleged in the petition.

*Peychaud v. Weber*, 133.

12. Judgment in this case being rendered on the thirteenth of May, signed the same day, and the appeal taken on the seventeenth of May, being made returnable on the third Monday of said month, there was a good reason for extending the return day from the third Monday of May, only a few days after the judgment was rendered, until the first Monday in November; that being the first return day after the first Monday in May, on which this court would sit. *State ex rel. Strauss v. Dubuclet*, 161.

13. Where the motion was for a suspensive appeal, and the one granted was merely devolutive, if the appellant submits to this modification of his demand, the appellee, not being injured by it, can not complain.

*Succession of Payne*, 202.

## APPEAL—Continued.

14. Where the motion to appeal was made in the name of the husband and the wife, the authorization to appeal is sufficiently established and the appeal bond can not be objected to, when made out in the name of the husband and the wife and is signed by both. *Ibid.*
15. Where the transcript is certified to be "a true copy of all the proceedings had and of all the testimony taken on the trial," it is sufficient. *Succession of Waterer*, 210.
16. A judgment by default, to become executory, must be notified to the defendant, and the delays from which the right to appeal began to run must date from the day on which the defendant was notified of the judgment. *Taylor v. Woodward et al.*, 212.
17. Where an appeal was asked to be dismissed on the ground that all the parties in interest were not parties to the appeal, the intervenor in the suit not having given an appeal bond, and not having appealed: Held—That the ground is not a good one. Because the intervenor does not choose to appeal, it does not follow that the defendant may not. *Meyer v. Dupre*, 216.
18. Where the record was incomplete, the clerk of the district court certifying that a part of the evidence used in the court below was missing at the time the record was made out, this is a good ground to remand the case, but not to dismiss the appeal. *Ibid.*
19. Where some of the appellants have not given bond and perfected the appeal, and some have, it is no ground for a motion to dismiss the appeal because of the want of proper parties; and where the bond is in favor of the clerk and the order of appeal was granted in open court, all parties not appellants are appellees. *Sevier et al. v. Sargent et al.*, 220.
20. Where, on plaintiff's appeal, the judgment of the court *a qua* was reversed and plaintiff's suit dismissed: Held, on rehearing—That plaintiff is to pay costs in the court *a qua*, and appellee the costs of appeal. *Martin v. Cannon*, 225.
21. A record is not defective because certain documents were omitted which had been offered to prove a fact admitted in said record. There was therefore no necessity to copy them in the transcript. *Coco v. Thieneman et al.*, 236.
22. Where the motion to dismiss the appeal is on the grounds that the sheriff who is a party to the suit is not a party to the appeal, and that the sureties to the injunction bond are not parties to the appeal as they did not sign the appeal bond: Held—That these grounds are not valid, because the appeal having been taken by motion in open court at the time when the judgment was rendered, all who are not appellants are appellees in the case. *Ibid.*

**APPEAL—Continued.**

23. Where the motion was to dismiss the appeal, on the ground that the amount in dispute did not exceed five hundred dollars: Held—That the suit being for one thousand dollars against three heirs who are in possession of the estate they inherited, for services rendered as attorney in settling the succession, and judgment having been asked and granted in the court *a quo* against them jointly for said sum, in proportion to the respective shares received by them, the motion must be overruled, because the claim, as stated, is one against the succession, and the fact that there are several heirs who must pay proportionately, does not change the nature and amount of the matter in dispute.

*Lartigue v. Clara White*, 291.

24. Where judgment being rendered in this case on the sixth of May, 1872, in favor of defendants, an appeal was granted on the fourteenth of the same month, returnable on the first Monday in November, on motion to dismiss the appeal on the ground that said first Monday in November was not the legal return day: Held—That the first return day after this appeal was taken, being the third Monday in May, that the judgment having been rendered on the tenth of the same month, and that the transcript of the case containing over two hundred pages, it must be presumed that the judge *a quo* thought it could not have been completed by that time, as the court adjourns before the first of June to the first Monday in November, and it follows that the first Monday in November was the proper return day.

*Goodwyn v. Perry et al.*, 292.

25. Where the appeal was taken by the plaintiff from a judgment dissolving an injunction without damages, and in his petition of appeal plaintiff prayed for citation against the defendants only: Held—That the motion to dismiss the appeal on the ground that all the parties in interest were not made parties to the appeal, must be overruled. It was not necessary that the surety on the injunction bond should have been made a party to the appeal.

*Batalora v. Erath*, 318.

26. Where the incompleteness of the record is due to a fault attributable to the clerk and not to the appellant, the appeal will not be dismissed on that ground.

*City of Baltimore v. Parlange*, 335.

27. It is useless to issue a *certiorari*, where the appellant has filed a certified copy of the missing document, so that the case can be examined. *Ibid.*
28. Where the claim of plaintiff was for about \$478, principal and interest, at the institution of the suit, and was alleged to be the hire paid in advance, under a charter party, for a steamboat, which

**APPEAL—Continued.**

was lost, and where the defendant reconvened, claiming \$10,200, the value of the boat: Held—That the motion to dismiss the appeal for want of jurisdiction, must prevail. The real matter in dispute is less than \$500. The charter party is not the matter in dispute. The demand, it is true, grows out of the charter party, but it is simply to recover back a certain sum paid under the provisions of the charter party; and the right to recover back, as alleged, springs from a cause outside of the charter party, and the existence, or validity, or the enforcement, of the charter party, is not involved in plaintiff's demand. Besides, no appeal has been taken in relation to the reconventional demand.

*Blanchard v. Kenison*, 385.

29. The motion to dismiss the appeal must prevail, where the appellant has lost his right to the suspensive appeal by failing to furnish the required bond within the time prescribed by law, and where the amount of bond not having been fixed by the judge, he can not avail himself of a devolutive appeal.

*Dwight v. Barrow*, 424.

30. The appellee is not entitled to notice of the order of appeal, where it was granted on the mandamus of this court, and relates back to the time the appeal was denied on the trial of the rule, contradictorily with the parties to the suit.

*State, ex rel. Nixon, v. Graham*, 433.

31. A statement of facts signed by the relator, "to facilitate the trial and to be used on the trial in the Supreme Court," would be sufficient to dispense with a citation of appeal on said relator. *Ibid.*

32. It is unnecessary to inquire whether the note subscribed in January, 1868, by Eugenie Deyris and her daughter, Clara Penn, was a joint or solidary obligation, because the court gave judgment on it against them jointly, and this judgment can not be increased by holding it to be a solidary obligation, for the reason that the plaintiff and appellee has not prayed for the amendment of the judgment.

*Seyburn v. Deyris*, 483.

33. Where the appellant, since the appeal was taken, has paid the judgment in favor of any of the appellees, this is an abandonment of the appeal as to them. *Hall et al. v. Chachere*, 493.

34. Where, on the verdict of the jury being rendered, the defendant moved for a new trial, which was refused, and an appeal was then asked for and granted, and the appeal bond filed, all prior to the date of the judgment as entered on the minutes of the court, in consequence of which a motion was made to dismiss the appeal on the ground that it was premature, having been applied for and granted before the judgment was rendered, and that the bond is defective and without force, because it was given before the judg-

**APPEAL—Continued.**

ment was rendered: Held—That the judge *a quo* having entertained a motion for a new trial and refused to grant it, the defendant may well have considered that the verdict of the jury was adopted as the judgment of the court as of that date. A new trial having been refused, there remained nothing further for the court to do but render a judgment pursuant thereto, and under the mode of procedure in the country, the appeal may be considered as taken *nunc pro tunc*. The granting of the appeal at the time was an irregularity that does not authorize the dismissal of it

*Mouton v. Broussard*, 497.

35. A prayer in this Court by a defendant, in answer to an appeal taken by his codefendant, that the judgment of the district court be reversed and the case be remanded for a new trial, is not an appeal which must be applied for and granted in the court *a qua*. Here is, in fact, a co-appellee, not a codefendant, and between appellees a judgment is not to be disturbed.

*Gant v. Eaton & Barstow*, 507.

36. When, on the rendition of a judgment, or immediately thereafter, an order for a devolutive appeal is obtained, the party obtaining it is not bound to give the bond immediately in order to preserve his right to said appeal.

*McWaters v. Smith*, 515.

37. A devolutive appeal may be taken at any time within twelve months, and this right is in no manner affected by any disposition the judgment creditor may choose to make of his judgment. *Ib.*

38. The omission in the transcript of the testimony, not reduced to writing, of one of the plaintiff's counsel, in reference to an incident of the trial, is not sufficient ground to dismiss the appeal, when the substance of the testimony is brought up in the bill of exceptions taken to the ruling of the judge on the subject.

*Rogers et al. v. Gibbs*, 563.

39. It has often been held that the signature of the appellant is not necessary to the appeal bond, his obligation to discharge any judgment rendered against him on the appeal resulting from the judgment itself. Hence if the counsel in this case was without special authority, as alleged, to sign for the appellant, it is no ground to dismiss the appeal.

*Sandel v. Douglas*, 564.

40. Where all objections to the solvency of the surety or sureties on the suspensive appeal bond were waived, and no controversy waged as to the sufficiency of the bond which was received as executed in the manner required by the order of the court, said court was divested of jurisdiction over the case, and the subsequent proceedings under the rule to show cause why the suspensive appeal should not be set aside, consequently without effect.

*State ex rel. Silverstein v. Judge of the Fifth District Court, parish of Orleans*, 622.

**APPEAL—Continued.**

41. A third party, appealing from a judgment, must allege and show a direct pecuniary interest in the subject matter of the suit.

*State ex rel. Blackemore v. Graham*, 625.

42. No appeal is to be entertained from an order allowing an intervenor, as owner, to bond property provisionally seized. The right to do so is expressly conferred by law (section 2915 R. S.); and the judge *a quo* had no discretion but to grant the order—the bond furnished taking the place of the property released. There can therefore be no irreparable injury resulting from the granting of the order, and the law has provided ample remedy in case the order should not be properly executed. An appeal would be without practical benefit. *Jennings v. McConnico*, 651.

43. When an injunction issues against an order of seizure and sale, and a suspensive appeal is taken from the judgment dissolving the injunction, the amount of the bond must be measured not by the amount involved in the injunction suit, but by the amount of the judgment ordering the seizure and sale staid by the injunction.

*State ex rel. Richardson v. Judge of the Fourteenth Judicial District Court*, 653.

44. It is not considered that the import of a suspensive appeal in such a case has any other effect than that of suspending the original order of sale. The judgment dissolving the injunction does not constitute a separate, independent judgment, that could be appealed from for any other purpose than that of affecting the original order of seizure and sale. *Ibid.*

45. A suspensive appeal being in force, respondents in this case conceded nothing in releasing the seizure of the relator's property for thirty days on his promise to pay the amount of the judgment rendered against him, with interest and costs. They had no right whatever to execute the judgment pending the suspensive appeal.

*State ex rel. Lacroix v. Judge of the Fifth District Court, parish of Orleans*, 664.

46. Therefore the promise insisted on was a mere *nudum pactum*, which could no more defeat the appeal than a like promise not to take an appeal could defeat one subsequently taken according to law.

*Ibid.*

47. The delays for filing an appeal only run when this Court is sitting. It is the duty of the appellant to see that the record contains all the evidence on which the case was tried. If he neglect so to do, the Court is without means of reviewing the case, and the appeal will be dismissed. *State ex rel. Magloire v. Barbin*, 667.

**SEE WALLS IN COMMON NO. 2—*State ex rel. D'Arcy v. Judge of the Fourth District Court, parish of Orleans*, 621.**

**ADOPTION.**

SEE TUTORS AND TUTORSHIP, NO. 10.

[*Succession of Forstall*, 430.]

**ATTORNEY GENERAL.**

SEE OFFICE AND OFFICERS.

**ADMINISTRATOR.**

SEE EXECUTOR.

**ADMINISTRATOR (PUBLIC.)**

1. The exhibition of a decree of the court in which the succession was opened, authorizing plaintiff to administer the same according to law in his capacity of public administrator, and, as such, an officer of the parish as well as of the court, must be held as at least a *prima facie* showing of capacity and authority to sue and stand in judgment in another parish. *Morse v. Griffith*, 213.
2. Where on the application of the public administrator of a parish, praying to be appointed administrator of a vacant estate, and to be authorized as such to institute all the proceedings required by law, the parish judge refused to take any judicial action in relation to the same, because a person representing himself to be the brother and the heir of the deceased had appeared, praying to be appointed administrator of said estate, and because such being the case, it was believed by the court that the public administrator had no right to have his prayer complied with. Held—That the judge *a quo* erred. The application of the public administrator should have been filed, and, after due notice given, tried contradictorily with the application of any other party, and the rights of all the parties settled by a judicial decree.

*State ex rel. Leonard v. Parish Judge of the Parish of Plaquemines*, 329.

3. No proceeding can be had, under the intrusion act, to remove the defendant from the office of public administrator, on the ground that said office has ceased to exist by virtue of the repeal of the law creating it. The case presented by the relator does not fall within the provisions of the statute.

*State ex rel. Hunter v. Hawley*, 487.

**AGENT.**

SEE PRINCIPAL.

SEE PLEADINGS AND PRACTICE.

**ACTION.**

1. The appointment of persons to represent parties to a suit should be made with caution and in cases clearly designated.  
*Holbrook v. Bronson*, 51.
2. Where the plaintiff claims property by inheritance as sole heir of his father and appends to his petition an order of the proper court recognizing him as such, and decreeing that he be put in possession

**ACTION—Continued.**

of his father's estate, and where he alleges that his father had a just and legal title to the property at the time of his decease and was in possession at that time: Held—That the allegations are sufficiently clear to enable him to maintain his action, and that an exception to plaintiff's petition on the ground of its vagueness and failure to set out the title under which he claims can not be maintained. It is for him to make out his case by sufficient evidence which the defendant is free to resist when presented.

*Chavanne v. Frizola*, 76.

3. There is no statutory provision of law requiring direct action against the sheriff to compel him to comply with what the plaintiff considers his adjudication, and to fix the respective rights of persons holding mortgages on the property sold under execution. The practice has always been to proceed by rule, and this practice has been expressly recognized by the decisions of this court.

*Blair & Co. v. Taylor et al.*, 144.

4. Article 55 Code of Practice, forbids the cumulation of petitory and possessory actions, except by consent of parties.

*St. Amand v. Long*, 164.

5. In a possessory action title is not at issue, and judgment should not be given on the titles of the parties. *Ibid.*

6. The prayer of a petition characterizes it, and when the action it institutes is possessory, the defendant can not change it into a petitory one, and reconvene by setting up title. *Ibid.*

7. Where there is no answer to an amended petition, nor default taken, especially if the amendment be one of substance and not one of form, all subsequent proceedings are irregular and will be set aside. The *contestatio litis*, which is the very foundation of a suit, did not exist. *Ibid.*

8. Where the husband has not appeared with his wife, in the suit instituted by her, the latter must show his authorization. Her own averments, or those of her counsel as to that fact are not sufficient. *Sommers v. Schmidt*, 193.

9. Where the husband joins the wife in her petition, this is sufficient authorization to her to sue. *Succession of Payne*, 202.

10. Where the defendant objected to the refusal of the judge *a quo* to charge the jury that actions for divorce are governed exclusively by section 1192, Revised Statutes: Held—That the judge committed no error, and the action is instituted under article 138 C. C., amended by act No. 76, Statutes of 1870. Where plaintiff was authorized to institute the suit, it followed that she was empowered to take a writ of sequestration or such other conservatory steps as were necessary to secure her rights.

*Michel v. Wiel*, 208.

**ACTION—Continued.**

11. The law reprobates a multiplicity of actions and aims at protecting parties against the annoyance of repeated lawsuits in regard to the same subject matter. *Stafford v. Stafford*, 223.
12. There is no ground for a call in warranty in a case of trespass, and hence there is no right of action against warrantors. *Coco v. Hardie*, 230.
13. Where in the motion to appoint a curator *ad hoc* to the defendant, who is a non-resident, it is simply stated that he is absent and not represented, and where said defendant has not been proceeded against by attachment, and it has not been alleged or proved that he has or had, when the suit was instituted, any property within the jurisdiction of the court before whom the suit was brought: Held—That this is not sufficient, and that the suit can not be maintained. *Rogay v. Juilliard*, 305.
14. Where there was no necessity for a citation, but where the plaintiff and opponent had been formally summoned by the defendant, to oppose his account as executor of a succession, if he thought proper, and to present his opposition within ten days: Held—That said defendant could not invoke judicial action in the matter to the prejudice of plaintiff and opponent before the specified day had expired. Hence, the order of homologation having been rendered after three days delay only, was null, and no action of nullity is necessary to set it aside. *Succession of Hogan*, 331.
15. The second mortgage creditor has no action against the prior mortgage creditor for the balance remaining in the sheriff's hands, or the hands of the purchaser, and the plaintiff, who gets his judgment paid, has no right to object to the payment of the second mortgage. *City of Baltimore v. Parlane*, 335.
16. Where the exception was that the suit is premature, because it is an effort to make the courts declare, in advance, that the defendant, after the year 1875, shall not be permitted to exercise the privileges of a corporation under an act extending its existence until 1895, and alleged to be unconstitutional; that its present exercise of privileges is not alleged to be illegal; and that the suit, therefore, can not be maintained, if at all, until the alleged date of the expiration of its present privileges in 1875: Held—That said exception is well taken. *State v. New Orleans Gaslight Company*, 398.
17. Where the exception is that the petition discloses no cause of action: Held—That for the purpose of trying this exception, all the allegations being taken as true, show ample cause of action. *Succession of Milton Taylor*, 446.
18. The jurisdiction of the court of the parish where property is sought to be made liable in an hypothecary action, can not be questioned. *Gant v. Eaton et al.*, 507.

**ATTACHMENT.**

1. Where defendant contended that the terms "will convert," instead of "is about to convert" her property into money, is too vague and indefinite to authorize the attachment against her: Held—That the allegations and affidavit in this case substantially comply with the law and justified the attachment. The essential part of the law is not that the debtor is about to convert her property into money, for there is no wrong in that, but that she will do so, "with the intent to place it beyond the reach of her creditors."

*Frere v. Perret*, 500.

2. The formalities required by law in attachment suits must be strictly observed—the posting of copies of the attachment and citation so as to give notice to the public, and the door of the courtroom is mentioned as the place. But the construction of the courthouse may be such as to make the posting at the entrance leading to the door of the courtroom a legal posting. The objection raised in this case is too technical.

*Cornell v. Meddock*, 590.

SEE BOND.

**BILLS AND PROMISSORY NOTES.**

1. Where A gives an accommodation check to B in exchange for B's check, the fact that B's check is not paid does not release A from the liabilities attaching to his own check, as soon as it is received by an innocent third party as cash.

*Crescent City Bank v. Hernandez*, 43.

2. The rights which become vested when a check is deposited can not be prejudiced by what happens after that time between the original parties.

*Ibid.*

3. Where a certificate of indebtedness with the date and number wanting was stolen, while being prepared for issuance, before it was issued and put in the market by the city of New Orleans, and after the date and number had been subsequently forged, was sold to the defendant, who called his vendor in warranty: Held—That this instrument can not be classed as negotiable paper upon which the maker is bound to innocent holders. It is transferable, it is true, but the transferee obtains only the rights of the transfer. In this case the transmitters and warrantors had no legal possession of the certificate of indebtedness of which the city of New Orleans never ceased to be the owner.

*City of New Orleans v. Strauss*, 50.

4. Where a notary stated in his certificate that the notice of protest was served at the residence of the indorser in the hands of his wife, and it appears by the indorser's testimony that he received the notice, a mistake as to the name of a street in designating the locality for the residence will not be fatal.

*Cadillon v. Rodriguez et al.*, 79.

**BILLS AND PROMISSORY NOTES—Continued.**

5. Where the evidence shows that the indorser was temporarily absent from New Orleans, at which place he resided, and where his family remained during his absence, that a notice of protest, intended for the indorser, was given to one Gasquet, his son-in-law, at said Gasquet's office, and that the indorser never received the notice: Held—That this is no notice and that the indorser is discharged. *Bank of New Orleans v. Millaudon*, 280.
  6. Whether there was a consideration or not between the makers and the payee of certain promissory notes, the makers were liable to the indorsees who acquired the notes before due and gave a valuable consideration therefor. *Battalora v. Erath*, 318.
  7. Whether a blank was filled up, before or after the signing of the notes, can not affect the indorsees who knew nothing thereof and who acted in perfect good faith. *Ibid.*
  8. Where a note was protested through error on one day, and was paid early on the next day, and, although there was carelessness on the part of the bank, no actual injury or damage was proved to have been caused thereby to the plaintiff, who was the drawer of the note: Held—That the verdict and judgment for five hundred dollars in the court *a qua* in favor of plaintiff was clearly erroneous. *Lalaure v. Southern Bank*, 330.
  9. Where the defendant bought certain slaves, who, by the will of one of their former owners, were to be emancipated at a future time, but were not so emancipated by the defendant, who made no efforts to surmount the obstacles that were in the way of their emancipation, but who was content to retain them in the condition of slavery, and to avail themselves of their labor until they were set free by the Government of the United States: Held—That said defendant has no legal ground to refuse to pay the promissory note which he gave for the purchase of said slaves. *Poydras v. Poydras*, 405.
  10. Where a note was paid by anticipation, the payment extinguished the mortgage which was given to secure it. It was an accessory to the contract, and fell when the debt was paid. *Hoyle v. Cazabat*, 438.
  11. The plaintiff can not recover against an indorser, when it is in evidence that the consideration of the indorsement was a slave. *Duperier v. Darby*, 477.
  12. As to the question whether interest should be allowed on the notes given for the interest on the mortgage claim, it is determined in the affirmative. By these notes the interest forming the consideration was capitalized. It was a valid consideration for the debt, evidenced by these notes, and there can be no reason why they should not bear interest. *Seyburn v. Deyris*, 483.
- SEE EVIDENCE, No. 23—*Guillory v. Déjean*, 481.
- SEE SUBROGATION—*Durac v. Ferrari*, 80.

**BANKRUPTCY.**

1. A having made a surrender in bankruptcy and become a discharged bankrupt, whose property was sold by his assignee, a suit could not be instituted against him on certain mortgage notes reposing on said property; he was no longer a party in interest, and could not be represented in the case by the curator *ad hoc* appointed for that purpose and upon whom citation was served. Such proceedings were mere nullities. There was then no citation, and prescription took effect against the notes upon which the judgment was predicated. *Kennedy v. Rust*, 554.
2. Under the statutory provisions of the United States, the property of a bankrupt may be sold free of incumbrances by order of the bankrupt court. *Willard v. Brigham*, 600.
3. But to sell property free of incumbrances, the assignee must apply to the bankrupt court for an order to that effect, and must set forth the facts that justify the application, so that the judge may decide whether it shall be granted, and the secured creditor must be properly notified and summoned to appear and protect his interests. Otherwise, being the holder of a prior mortgage and not being a party to the proceedings, he would not have his rights affected thereby, and his hypothecary action, as in this case, would interrupt prescription, where notices were served upon the third possessor under the act of sale by the assignee. *Ibid.*
4. The property having passed out of the jurisdiction of the bankrupt court, it was useless to cite the assignee in a proceeding against the hypothecated property, because he had no interest therein; and it was also useless to cite the discharged bankrupt (the obligor), because he was no longer bound for the debt. *Ibid.*

SEE LAWS, No. 10—*Tate v. Laforest*, 187.

**BILLS OF EXCEPTIONS.**

1. Objections not stated in a bill of exceptions will not be considered by this court. *Fuentes v. Gaines*, 85.
2. Where a motion as to the disqualifications of a grand juror, which rested on questions of facts, was overruled and no bill of exceptions taken: Held—That the court could not look into the correctness of the ruling, not having jurisdiction of facts in criminal causes. *State v. Branch*, 115.
3. Where the plaintiffs, appealing from the judgment of the court below, have assigned as error on the face of the record that the motion to dissolve an injunction having been overruled, an exception based on the same grounds could not have been acted upon by the judge *a quo* a second time: Held—That this court regards the document, called an exception, an answer, and that there existed no reason why the judge *a quo* could not pass upon the

**BILLS OF EXCEPTIONS—Continued.**

merits of the case, which he seems to have done, although he also calls an answer an exception. *Cheval v. St. Leon Destez*, 338.

4. Where the appellant referred to the written reasons of the judge *a quo* in refusing a new trial, for the facts in regard to the qualifications of a juror and the time at which appellant alleged he became aware of said facts: Held—That it does not appear that timely objection was raised, or a bill of exceptions reserved on this point, or an assignment of errors made on the record. The only mode of bringing the facts of a criminal cause in this respect before this court is by a bill of exceptions. *State v. Socha*, 417.

SEE APPEALS, INJUNCTION, SURETY.

SEE ACTION, No. 16—*State v. New Orleans Gaslight Company*, 398.

**BONDS.**

1. Where the liability for interest coupons results solely from, and is embraced in, the liability for the bonds of which they were a part when issued, a release for the bonds includes the liability for the coupons.

*State v. North Louisiana and Texas Railroad Company*, 65.

2. The objection that when the release bond in this case was signed on the first of July, 1868, there was no law authorizing the release on bond of property provisionally seized, is not well taken. It was authorized by the act of the sixth July, 1867. See Revised Statutes of 1870, sec. 1914. *Lepretre v. Barthet*, 124.
3. As a general rule the judicial surety, a solidary obligor, can not be proceeded against until the necessary steps are taken to enforce judgment against the principal debtor. R. C. 3066. But when a change happens in the debtor's estate, so that execution can not be issued against it, the judgment creditor may proceed at once against the surety. *Ibid.*

4. Where the condition of the bond to release property provisionally seized is, "that the debtor shall pay such judgment as may be rendered against him," the fact that the property thus seized remains in the hands of the debtor after the release bond was given, does not discharge the bond or release the surety. *Ibid.*

5. There is no law which directs a book to be kept in the parish recorders' offices for the recording of tutors' bonds, and this court is not satisfied that the recording of a tutor's bond in a book kept for the recording of any particular kind of bonds, or for the recording generally of bonds of every kind, would suffice to operate as notice of a minor's mortgage, where in the same office are kept the books in which the law directs mortgages to be inscribed.

*Fisher v. Tunnard*, 179.

6. Where the motion to appeal was made in the name of the husband and the wife, the authorization to appeal is sufficiently established,

**BONDS—Continued.**

and the appeal bond can not be objected to, when made out in the name of the husband and the wife and is signed by both.

*Succession of Payne*, 202.

7. The case of *Block Brothers v. Burthe*, 20 An. p. 344, which, in the opinion of the judge *a quo*, covers the case at bar in every particular, was determined on the ground that the opponent was properly the defendant and had the right to release by bond, an act which could not be considered as operating an irreparable injury to the appellant. There seems to be a conflict between the case of *Block Brothers v. Burthe* and that of *Duperier v. Flanders*, 20 An. 29. The court, however, inclines to recognize the doctrine laid down in the latter case, and to follow the principles enunciated in the later case of *Dawson v. Williamson*, 22 An. 535, as controlling.

*State ex rel. Gay et al. v. Judge of the Fourth District Court, parish of Orleans*, 299.

8. A surety on an arrest bond can not escape his responsibility, because his principal has put himself beyond the jurisdiction of the court.  
*Rogay v. Juilliard*, 305.
9. Where the amount of the attachment bond is less than one-half over and above the amount of the debt alleged to be owing, by less than one dollar, such a deficiency will not be noticed by this court. *De minimis non curat lex.*

*Bodet et al. v. Nibourel*, 499.

SEE EXECUTOR AND ADMINISTRATOR, 11, 12, 13—*Succession of Leontine Guilbeau*, 474.

SEE APPEAL, No. 39—*Sandel v. Douglas*, 564.

No. 40—*State ex rel. Silverstein v. Judge of the Fifth District Court, parish of Orleans*, 622.

**CONTEMPT.**

1. The penalty for not producing books and papers in obedience to a *subpena duces tecum*, is not imprisonment for contempt. The consequence of the disobedience is, that the party who has obtained the subpoena has the right to ask that the facts which he states in his affidavit for the subpoena be taken as proved.

*Columbia Fire Company No. 5 v. Purcell*, 283.

2. To use abusive language towards a member of the court and commit an assault upon his person during a recess, and in the court room, under the pretext of resenting what he had said or done when on the bench, is a contempt of court. An answer by the defendant to the rule to show cause why he should not be punished, which is substantially a justification of his act, must be regarded as an aggravation of the contempt.

*State v. Garland*, 532.

## CONFUSION.

1. Where it is admitted that the money claimed by plaintiffs was given to the defendant and her two children, and that by the act of their merchants and factors, the garnishees in this case, said money was placed to the sole credit of their mother, the defendant: Held—That this act did not divest the right of her children, the intervenors in this proceeding, and did not make the money garnished the sole property of defendant. There was no such confusion or mingling as affected the rights of the intervenors.

*Jurey & Harris v. Hord et al.*, 465.

## CONTRACT.

1. Where the allegations and the prayer of the petition and the evidence adduced make it clear that the action is predicated upon a contract, the plaintiff can not recover on a *quantum meruit*.

*Mazureau & Hennen v. Morgan*, 281.

- 2 In this case the contract relied on is in flagrant violation of the law, Statute of 1808, thirty-first of March. *Ibid.*

3. If, in a suit upon a contract, the party fail to prove the contract, but prove without objection the value of services rendered, a judgment might be rendered upon a *quantum meruit*. But when the contract is proved, it is the law between the parties, and the parties must succeed or fail according to the terms of that contract. The court is not at liberty to substitute another, based upon the presumed assent of the parties. *Ibid.*

4. The plaintiff's claim is inseparably connected with an unlawful contract, and must fall with it. *Ibid.*

5. Where a creditor, ignorant of the fact that his claim on his debtor was secured, wrote to other creditors of the same, expressing his assent to accepting concurrently with them the surrender of property offered on certain conditions by said debtor, because he believed that he was in no better condition than those creditors: Held—That this was a contract which was void from error in the motive, inasmuch as it proceeded from a cause supposed to exist, which in reality did not exist, and because its existence was a condition precedent to the contract.

*Goodwyn v. Perry*, 292.

6. Where the State Assessors have delivered to the Auditor the assessment roll and received in full their compensation for their services, the contract between them and the State for making the assessment is completely executé. The obligation of the State to pay them is discharged, and it can not afterwards be revived by any use the Auditor might make of said roll.

*State ex rel. Board of Assessors v. Graham*, 309.

7. A contract made prior to the adoption of the constitution of Louisiana, 1868, can not be affected by the provision contained in section 127 of that constitution. If the contract was valid then, it is

**CONTRACT—Continued.**

clear that this provision not only impairs but absolutely destroys its obligation within the meaning of the tenth section of the first article of the Constitution of the United States. Any judgment of a State court resting on such enactment of a State constitution, after the date of the contract, must be reversed in the Supreme Court of the United States. The re-inscription of a mortgage on the granting of an extension of time for the payment of a note, without any consideration for such extension, or change in any other term or condition of the contract, can not be held to be an agreement requiring a stamp.

*Henderson v. Merchants' Mutual Insurance Co.*, 343.

8. The civil government of the city of New Orleans can not be permitted to deny the rights derived by the relators in this case from their contract with said city on the ground that it was under military authority at the time, when, after the cessation of that military authority, those rights have been, in part, frequently recognized and ratified by its ordinances. That contract was an entirety. The city had no right to sever its obligations, so as to ratify one part of the contract and reject another.

*State ex rel. St. Charles street Railroad Co. v. Cockrem*, 356.

9. The city, having for a number of years received without objection the consideration of the contract, should not be heard when disputing the contract itself.

*Ibid.*

10. The plea that the parties had forfeited the right of way by voluntarily abandoning the construction of railroads in certain streets and by failing to construct said roads within the time limited by the contract, is not made out, when proved that they were prohibited to do the work by an injunction from a third party; and because the injunction taken in September, 1866, was not dissolved before June, 1872, it is not to be inferred that it was kept so long in force by the wish and connivance of the relators, when the city was a party to the injunction suit, and having the same right to push the case that the relators had, did not do so.

*Ibid.*

11. The city surveyor was bound, when called upon, to furnish the requisite lines and levels for the building of the road—a ministerial duty which was imposed upon him by the sixth section of the original ordinance authorizing the construction of the road.

*Ibid.*

12. The fact that the limit to which supplies might have been required according to contract, was not reached, does not amount to a violation of, or a refusal to comply with the contract, where there is no evidence that the plaintiff was called on and refused to furnish more than is claimed by him in his suit.

*Lalanne v. Goodbee*, 481.

**CONTRACT—Continued.**

13. This is an action to set aside the pretended transfer of a suit on the ground that it was the sale of a litigious right in contravention of article 2447 of the Revised Code. It is the actual intention of the parties, and not the form of the instrument, that determines the character of the contract. *Kennedy v. Morrison*, 605.
14. Article 2447, Revised Code, did not preclude Morrison, one of the defendants in this case, from making a contract with Kennedy, the plaintiff, for the compromise and settlement of the suit which the latter was prosecuting against him. Farmer, attorney at law, also one of the defendants in the present case, was merely a party interposed, and acquired no rights whatever under the settlement. Morrison gave the consideration under the settlement, and Kennedy transferred the suit for the purpose of having it dismissed. *Ibid.*
15. But even if Farmer had paid the price, or given the consideration, it would not have been the sale of a litigious right in the sense of article 2447, because the purchase was made, not to carry on the litigation, but to end it. *Ibid.*
16. Assuming that the sale or transfer of the suit was actually made to Farmer, there is an insurmountable obstacle in plaintiff's way. He has not returned, nor offered to return, the consideration which he received. He can not keep the fruits of the transfer, even though it be the sale of a litigious right, and ask to be restored to the ownership of the thing which he transferred. *Ibid.*
17. The plaintiff in this case is bound by the modified contract to which he gave his assent, and by his own interpretation of it. The city is not in default, and consequently not liable in damages. *Thomas v. City of New Orleans*, 660.

**CRIMINAL LAW AND PRACTICE.**

1. Where a bill of exceptions was taken to the refusal of the judge to charge the jury as requested, that if they entertained a reasonable doubt as to the sanity of the prisoner at the time of the commission of the alleged act, they were bound to acquit him, and the judge charged, on the contrary, that the law presumed the sanity of every man, and that it devolved on the prisoner, under a plea of insanity, to satisfy the jury by a preponderance of proof that he was insane at the time of the alleged act: Held—That the exception was properly overruled. *State v. Burns*, 302.
2. Where the exception was to the ruling of the court permitting an indictment to be amended by inserting the value of the mule alleged to have been stolen: Held—That it was not necessary that the value of the animal should have been set forth in the indictment. The amendment added nothing to the validity of the

**CRIMINAL LAW AND PRACTICE—Continued.**

- instrument, nor did it in any manner vitiate it. *Utile per inutile non vitiatur.* *State v. Wells*, 372.
3. The statute of Louisiana authorizing prosecutions by the district attorney on information is not in conflict with the fifth amendment to the constitution of the United States, which declares "that no person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment by a grand jury." The restriction by this amendment has no application to State courts. *State v. Kelly*, 381.
4. Where the accused, on his being brought to the bar in the custody of the sheriff, is ready for his trial, it is to be presumed that if he has no counsel and does not ask the court to assign him one, he chooses to be heard in his own defense. *Ibid.*
5. The fact that, on his application for a new trial, he stated that he was without counsel and was thus unable to defend himself, is no reason why this court should reverse the judgment which was based upon the verdict of a jury. *Ibid.*
6. When the offense with which the prisoner was charged consisted in his having entered a vessel in the day time with intent to steal, it was not necessary that the information should have recited and described the precise article which he intended to steal. It is sufficient if the indictment is drawn up in accordance with the statute on this subject. R. S. sec. 854. *Ibid.*
7. Until the jury box is exhausted the jury may be drawn therefrom, even though fifteen months have elapsed since the list of jurors was furnished by the sheriff. The form of indictment is sufficient where it fully apprises the accused of the crime with which he is charged. *State v. Petrie*, 386.
8. When the judge *a quo* had already charged the jury that "they must be satisfied that the prisoner knew the certificates he published as true were false at the time of passing them, and that if they had any reasonable doubt of his guilt, they must acquit him." Held—That this was substantially the charge asked for by defendant's counsel, though not identical in language, and that it met all the requirements of the law. *State v. Carr*, 407.
9. Where the judge *a quo* refused to charge the jury, as requested, that "the fact that defendant had offered no evidence is in no way to be taken as an admission of guilt," instead of which the judge charged "that all circumstances against the prisoner within his power to explain, which he refused to do, were to be taken and weighed by the jury as circumstances against the prisoner." Held—That this was an error. The accused is justified in relying, if he chooses, upon the insufficiency of the evidence adduced by the prosecution, and his so doing should not be taken as an acknowledgment by him of his guilt. *Ibid.*

## CRIMINAL LAW AND PRACTICE—Continued.

10. Section 10 of act 73 of 1872 does not so far abrogate section 833, Revised Statutes of 1870, that a person may not be indicted under the former, as was done in this case, for "publishing as true, false, forged and counterfeited certificates of a public officer," etc. Both laws are easily construed so as to give effect to each, and will support an indictment, if properly drawn up under each respectively. *Ibid.*
11. The indictment properly sets forth the offense of which the prisoner is accused, as described in section 833, Revised Statutes of 1870, under which said indictment is drawn, and is not defective in substance. It follows substantially, if not literally, the language of said section. *Ibid.*
12. Where the defendants were fully informed by the allegations of the indictment of the offense with which they were charged, it was unnecessary to allege also the common law ingredients of the crime of rape, with the intent to commit which the accompanying offense of burglary was charged. *State v. Jean Gay*, 472.
13. The duty imposed by law with regard to the *venire* of the jury is ministerial, and one which can be performed by a deputy of one of the specified officers, when legally appointed. *Ibid.*
14. The challenge to a juror, whose native tongue was the French, and who did not understand the English language, was properly sustained. *Ibid.*
15. The proceedings of the court are required to be conducted in the English language—and the fact that the judge, counsel, witnesses, and accused understand and speak other languages can not dispense with this requirement. Jurors, to be competent, must be able to understand all the pleadings and proceedings, as they must be considered by them. *Ibid.*
16. The right of the State to challenge without cause is limited to the number six, whatever may be the number of defendants joined in the indictment. *Ibid.*
17. It makes no difference whether an accomplice, who becomes a witness, has been convicted or not, or whether he be joined or not, in the same indictment with the prisoner to be tried, provided he be not put upon his trial at the same time. *State v. Prudhomme et al.*, 522.
18. The circumstance of the witness being an accomplice of the party on trial, affects his credibility only, of which the jury are to judge. *Ibid.*
19. Under the laws of this State, all parties present, aiding and abetting in the commission of a felony, are principals therein. If the principle which prevents an accomplice to testify, be so restricted as to exclude all principals, it would have little practical importance. *Ibid.*

## CRIMINAL LAW AND PRACTICE—Continued.

20. A jury may convict on the uncorroborated testimony of an accomplice; they are the judges of his credibility. The rule requiring the judge to charge the jury that the testimony of an accomplice needs confirmation is rather a rule of practice than a rule of law. *Ibid.*
21. A judgment decreeing imprisonment for life is not unauthorized by law, because the words "hard labor" are omitted in it. The words are not sacramental. They would add but little to the efficacy of the judgment. *Ibid.*
22. An indictment charging that defendants received the property stolen with a felonious intent knowing the same to have been stolen at the time, is in sufficient conformity with the statute. *State v. Allemand*, 525.
23. Where a motion for a new trial and one in arrest of judgment were predicated upon the hypothesis that only forty-six jurors were drawn on the panel: Held—That inasmuch as no objection was made to the jury until after conviction, the refusal of the judge *a quo* to grant a new trial or to arrest the judgment was correct, even if the facts were as supposed. One can not take the chances of a verdict in his favor, and after conviction object to the jury. *State v. Jackson et al.*, 537.
24. The fact that a juror was for a moment out of the presence of the officer under whose charge he was, when it does not appear that he had any communication with any other person, does not necessarily establish the presumption of misconduct, and make it obligatory upon this court to set aside the verdict of the jury. *State v. Turner et al.*, 573.
25. In the copy of the indictment served upon the prisoners in this case, the name of one of the jurors, which is "Philip Darden," appeared as "Dauden." The objection on this point was correctly overruled. It is not shown how this trifling error has prejudiced the prisoners, and this court does not see how it could have had this effect. *Ibid.*
26. Where, on the prosecutrix being offered as a witness by the State, she was interrogated in chief, cross-examined by the defense, re-examined by the State, and then sought to be recross-examined by the defense: Held—That the court properly refused this to be done, if the re-examination on the part of the State was confined to such matters as the cross-examination drew out. *Ibid.*
27. A motion in arrest of judgment will not prevail, on the ground that the judge excused two persons from serving on the jury, who had been summoned as jurors, and who were not exempt under the law. This objection should have been made when the jury were being impaneled. *Ibid.*

**CRIMINAL LAW AND PRACTICE—Continued.**

28. The erasure of the name "Albert" and the interlineation of that of "John" in the indictment is not a good ground in arrest of judgment. The accused was identified as the party who committed the crime, and whether he committed it in the name of Albert or John matters nothing to justice. The district attorney swears that the change in the name was made on the day the prisoner was arraigned. The court was then authorized at any time to have its records corrected, so as to make them conform to the facts. *Ibid.*
29. There is nothing in the objection that some of the jurors who served on the jury do not appear on the *venire*, or list of the jurors drawn to serve for that term of the court. It should have been made before the trial was entered upon and while the jury was being impaneled. The prisoners took the chance of the jury; they must take the verdict. *Ibid.*
30. The proposition urged, on the motion for a new trial, that the court refused to charge the jury, as requested, that it is necessary to prove both penetration and emission to make out the crime of rape, is monstrous. It is the penetration which destroys the victim and constitutes the crime, and not the consummation of the violator's lust. Technicalities which have the tendency to make the criminal laws of the country a shield, instead of a terror, to evil doers, can not be countenanced by this court. *Ibid.*

SEE SHERIFF.

**CONSTITUTION AND CONSTITUTIONAL LAW.**

1. A police juryman is not an officer in the intendment of that clause of the constitution prohibiting a person from holding more than one office, except that of justice of the peace. That clause of the constitution applies only to constitutional offices, and does not prevent a constitutional officer from holding a municipal office.

*State ex rel. Gorham v. Montgomery*, 138.

2. There is no prohibition in the constitution against the sale of property for taxes in lots of from ten to fifty acres, or any other quantity. The fact that the constitution directs that all lands sold in pursuance of decrees of courts shall be divided into tracts of from ten to fifty acres, does not inhibit the legislature from directing lands sold under other process to be similarly divided.

*Gay v. Hebert*, 196.

3. The homestead law, exempting certain property from seizure on a judgment enforcing a mere ordinary debt, is not unconstitutional. The rights of the creditor, and not his security, unless the security forms part of his contract, must be invaded before he can invoke the constitutional privilege on which he relies. The law, in this case, does not affect his vested rights, but only impairs his security for the payment of his claim. *Robert v. Coco*, 199.

**CONSTITUTION AND CONSTITUTIONAL LAW—Continued.**

4. The constitution authorizes the Governor to convene the Legislature on extraordinary occasions. There is no reason, therefore, to maintain that article 61 of that instrument refers only to the regular or annual sessions of the General Assembly in relation to executive appointments.

*State ex rel. Morgan v. Kennard*, 238.

5. The provisions of the act of the Legislature, No. 39, 1873, for transferring cases are not repugnant to articles 83, 90, and 114 of the State Constitution.

*Kemp v. Ellis*, 253.

6. The amendment of the constitution of the State, ratified on November 7, 1870, which limits the State debt to \$25,000,000, is not violated by the law creating the Levee Company. The bonds of the State are not out, nor is any one its creditor, nor can any one become its creditor, for any sum contracted by the Levee Company.

*State ex rel. Louisiana Levee Company v. Clinton*, 401.

7. It is not for the court, in this case, to determine that the payments demanded are, or are not, without a valid consideration. It has only to decide whether the acts relating to the Levee Board are constitutional or not.

*Ibid.*

8. The act No. 27, 1871, which ratifies and confirms the contract between the Levee Company and the Governor, is, after all, an act of the Legislature, and is valid unless conflicting with the constitution of the State, and this has not been shown.

*Ibid.*

9. The question on the merits presented in this suit is identical with the one decided in the case of the *State ex rel. Salomon & Simpson* against the same defendant, 23 An. 402. The State debt exceeded the constitutional limitation of \$25,000,000 at the time the act for the relief of the relator was passed, and created a debt in his favor. His claim therefore can not be enforced.

*State ex rel. Nixon v. Graham*, 433.

10. Where the debt and contract on which a judgment was obtained existed prior to the Constitution of 1868, article 132 of that instrument is not applicable, and, therefore, the judgment does not fall within the provisions of the act No. 40, approved February 24, 1869. Article 132 of the Constitution is not self-acting, and can only have effect in the manner provided by statute.

*Morrison v. Flournoy*, 545.

11. The fact whether or not a law has been duly promulgated may be within the province of the judiciary, but whether or not it went regularly through all the stages necessary for its passage as a law up to the promulgation, is a subject confined to other departments of the constitution.

*Whited v. Lewis*, 568.

## CONSTITUTION AND CONSTITUTIONAL LAW—Continued.

12. The eleventh section of act 81 of the regular session of 1872, promulgated on the thirteenth April, 1873, amending the charter of the town of Monroe, was not passed in violation of the formalities required by the constitution. The objects embraced in said section of said act are embraced in the title. *Ibid.*
13. In 6 An., 605, it is said: "When portions of a law come within the reasonable intent of its title, and others do not, the latter alone are unconstitutional, provided they can stand alone." This properly applies to the aforesaid section. *Ibid.*
14. The right of a party to raise the question of the constitutionality of a law is limited to the provisions thereof which affect his interest in the litigation. *Ibid.*
15. Where it was contended that section 3493, R. S., did not authorize the Secretary of State to promulgate an act of the Legislature that had not received the Executive sanction, as was the case in this suit: Held—That this is too restricted an interpretation of the functions of the Secretary of State when connected with article 66 of the constitution. *Ibid.*
16. The act in question was necessarily presented to the Governor, but was published without his signature. Although not drawn up with such precision and fullness as might be done, a fair construction of section 3493, R. S., in the light of the various articles of the constitution having any reference to the subject, will afford authority in the Secretary of State to deliver to the State Printer for publication all bills in the category of this one, with the statement that they became laws without the signature of the Governor. *Ibid.*
17. A bill becoming a law without the Governor's signature must be promulgated as well as one with his signature, and all bills must be promulgated through the office of the Secretary of State. *Ibid.*
18. It may not be sacramental, under existing legislation, that he shall state, or add in a note, that it became a law without the signature of the Governor, and how it so happened; but the court can not say that, under all the provisions of the constitution and the laws on the subject, his doing so will destroy the law or prevent a bill in such a contingency from becoming a law. *Ibid.*
19. A political corporation can not make a contract in violation of the law of its incorporation. Under a title purporting to amend only the first section of a statute, it is not competent to amend other sections of said act. Such amendments not being covered by the title are null and void, because made in violation of article 114 of the constitution.

*Wisner's Curator v. Mayor and City Council of Monroe*, 598.

## CONSTITUTION AND CONSTITUTIONAL LAW—Continued.

20. The act of nineteenth April, 1871, which provides for the refunding of certain taxes improperly collected by the State, and on which the relators in this case rest their claim, is unconstitutional, as it clearly increases the State debt to an amount exceeding twenty-five millions. *State ex rel. Blackemore v. Graham*, 625.
21. Said act of the nineteenth April, 1871, is also in violation of article 111 of the State constitution, because, while creating a debt exceeding one hundred thousand dollars, it does not provide adequate ways and means for the payment of the current interest and of the principal when the same shall become due. *Ibid.*
22. No appropriation was made by law for drawing from the Treasury the large sum needed to reimburse the numerous claimants applying for this refunding of taxes under the law of 1871, which is, therefore, in violation of article 104 of the State constitution. *Ibid.*
23. The act No. 55, approved April 4, 1865, has never been held to be in violation of the State constitution. *Ibid.*
24. The statute of 1873 declaring that the amount of the contribution due by the stockholders of a bank shall be recoverable by summary process, as in case of a confession of judgment, is not in violation either of the State constitution or of the federal one. *Citizens' Bank of Louisiana v. Deynoodt*, 628.
25. The statute provides a remedy for the more speedy enforcement of an obligation. It does not affect in any manner the obligation of the contract, nor is it retroactive; it provides only for the future. *Ibid.*

SEE LAWS No. 2—*State v. North Louisiana and Texas Railroad Company*, 65.

SEE CONTRACT No. 7—*Henderson v. Merchants' Mutual Insurance Company*, 343.

SEE CRIMINAL LAW No. 3—*State v. Kelley*, 381.

SEE COURTS No. 19 to 23—*Mechanics' and Traders' Bank v. Union Bank*, 387.

No. 24—*State v. New Orleans Gas Light Co.*, 398.

SEE NEW ORLEANS No. 1—*City of New Orleans v. Crescent Mutual Insurance Company*, 390.

SEE CORPORATION, Nos. 3, 4, 5—*State ex rel. Straight University v.. Graham*, 440.

SEE LAWS AND STATUTES, No. 20—*Traders' and Factors' Insurance Co. v. City of New Orleans*, 454.

SEE TAXATION AND TAXES, No. 26, 27—*Whited v. Lewis*, 568.

## CITATION.

1. Where citation is served personally on a married woman authorized to defend the suit, she is regularly in court, and on its being

## CITATION—Continued.

- shown that she has a domicile in the parish, a notice to which she is entitled can be served on her personally, or at her said domicile, unless there is some special provision of law requiring another mode of giving the notice. *Holbrook v. Bronson*, 51.
2. Article 141 R. C. C. is to be construed as applying to the defendant, who is absent, or incapable of acting at the institution of the suit, and can not be cited in the usual way, but not to one who is legally and regularly a party to a suit and who voluntarily declines making a defense or temporarily leaves the place of the jurisdiction after being cited. The jurisdiction of the court can not thus be defeated. *Ibid.*
3. Where, on execution being issued in this case, Battle, Thorn & Co. were made garnishees by addressing the citation to said firm and serving the same on H. A. Battle, a member thereof, who answered the interrogatories under oath, but signed the name of the firm to the answers, instead of signing his own: Held—That the answers were sufficient and that the interrogatories could not be taken for confessed. He answered in the precise name in which he was cited. If the plaintiff wished him to sign his individual name to the sworn papers, the citation should have been addressed in that name. The answers were under oath, and could, if untrue, subject the garnishee, H. A. Battle, to a prosecution for perjury. This is the test. *Bell v. Short*, 312.
4. Where a suit was instituted on promissory notes, which were the obligations of an ordinary partnership, whose members were only bound jointly and had to be sued as joint obligors: Held—That a citation addressed to the firm, and served at the elected domicile of the ordinary partners, did not have the effect of bringing them into court. The judgment against them is therefore a nullity. The citations should have been addressed to each of the defendants. *Le Blanc v. Marsoudet*, 464.

SEE BANKRUPTCY, No. 1—*Kennedy v. Rust*, 554.

SEE APPEAL, No. 31—*Estate ex rel. Nixon v. Graham*, 433.

## COMPENSATION.

1. Where A as assignee of B sued C on an open account, and C alleged in answer that he had deposited with B a large sum of money before the transfer to A, which had not been accounted for, and pleaded compensation: Held—That C, under the pleadings, did not owe B the amount set out in the account sued on; that he could transfer to A only such rights as he possessed; that compensation took place, and that C should have the opportunity to show it. *Adams v. Webster*, 117.

## CURATOR AD HOC.

SEE SUCCESSION, No. 9—*Malone v. Casey*, 466.

SEE BANKRUPTCY, No. 1—*Kennedy v. Rust*, 554.

**COMMUNITY.**

1. Before the passage of the act of March 18, 1852, by which the community of acquests was extended, in favor of non resident married persons, to property in this State thereafter acquired, no such community existed. The property acquired after their residence here, alone fell into full partnership.

*Succession of Waterer*, 210.

2. Where the surviving husband, administrator of his wife's estate, brought with him to this State, as his personal property, more stock of every kind than he had at the decease of his wife: Held—That at the dissolution of the community he has the right to take in kind, if still existing, what he brought in marriage, and from the cattle remaining a number of head equal to that brought by him in marriage.
3. The remaining portion of the unpaid price of community property acquired during marriage, is a community debt, and this debt is secured by the vendor's privilege. Where this privilege existed anterior to the wife's tacit mortgage, which commenced only from the time her husband became her debtor, it can not of course be controlled by it.

*Lemoine v. Powers*, 514.

SEE MARRIAGE, No. 9—*Rusk v. Warren*, 314.

No. 10—*Millaudon v. Carson*, 380.

No. 15—*Desobry v. Schlater*, 425.

SEE SUCCESSION, No. 10—*Phelan vs. Ax*, 379.

SEE MORTGAGE, No. 11—*Seyburn v. Deyris*, 483.

**CITIZENSHIP.**

1. A citizen, in its largest sense, is any native born or naturalized person, who is entitled to full protection in the exercise and enjoyment of the so called private rights. By the laws of Louisiana native born free persons of color were in the full enjoyment of those rights in 1844.
2. By the treaty whereby Louisiana was acquired, the free colored inhabitants of Louisiana were admitted to a citizenship of the United States; therefore, a free colored person who was born in Louisiana, who had always lived there, and whose ancestors for two generations before him had been free and had lived in Louisiana, was a citizen of that State in 1860, at the epoch when the commissioner of the general land office, in an *ex parte* proceeding, canceled an entry made by said person under the pre-emption laws of 1841, on the thirty-first day of December, 1844, on the ground that said person, being a *free negro*, was not a citizen of the United States, although he had remained in possession of the land since the entry and had complied with all the requirements of the laws of the United States to entitle him to enter the land by pre-emption.

*Ibid.*

## COLORED PERSONS.

SEE CITIZENSHIP, No. 1—*Walsh v. Lallande*, 188.

SEE LAWS, No. 11—*Ibid.*

SEE CIVIL CODE, No. 8—*Fowler et al. v. Morgan*, 206.

## CIVIL CODE.

1. Articles 121 and 131 of the Civil Code can not be construed to warrant the conclusion that the carrying on of any other business by a married woman than that of merchandise constitutes her a public merchant.

*Moussier and Courcelle v. Gustine and Sauvinet*, 36.

2. The words "separate trade" in the latter clause of article 131 of the Civil Code, declaring that the wife "is considered as a public merchant if she carries on a separate trade, but not if she retails only the merchandise belonging to the commerce carried on by her husband," refer clearly to the trade in merchandise and not to any other business or pursuit. *Ibid.*

3. The sixth section of the act of 1868, p. 194, concerning the transfer of bills of lading and the effects of that transfer, is only a legislative sanction given to the commercial law of universal application, by which it is held that a bill of lading, legally transferred, gives title to the property it represents. It does not clash with the statute of 1855 incorporated in the 3227th article of the Civil Code. The article 3227 does not give any privilege upon produce sold for cash. *Delgado & Co. v. Wilbur & Co.*, 82.

4. Article 1994, Civil Code, applies to acts made in fraud of creditors.

*Fuentes v. Gaines*, 85.

5. Article 3542, Civil Code, refers to actions for the nullity of testaments when the instituted heir is in possession of property under the will, and is sued by the heirs at law to annul the will and to take from the instituted heir the property. It does not apply to a case in which the defendant in a chancery suit is obliged to come to the probate court to establish a part of his defense in consequence of the limited jurisdiction of the Circuit Court of the United States. *Ibid.*

6. It is essential to specify the day, month and year to give a date to a testament in the sense of article 1588 of the Civil Code. *Ibid.*

7. The facts required to be established by article 1655, Civil Code, for the probating of an olographic will must be proved by competent testimony, and can not be inferred by the court. *Ibid.*

8. Where it was contended that a donation *inter vivos*, made in 1858, by a white father to his two daughters, who were born of a black woman, then a slave, but who, with their mother, were entitled to claim their liberty at a future time (*statu liberis*) was in violation of law, and therefore null and void: Held—That the rights of the parties must be decided under the provisions of article 193 of

**CIVIL CODE—Continued.**

the Code of 1825, and that under the circumstances of the case the donation must be sustained, whatever may be the moral view of the question. *Fowler et al. v. Morgan*, 206.

9. Where the defendant objected to the refusal of the judge *a quo* to charge the jury that actions for divorce are governed exclusively by section 1192, Revised Statutes: Held—That the judge committed no error, and the action is instituted under article 138 C. C., amended by act No. 76, statutes of 1870.

*Michel v. Weil*, 208.

**CARRIERS.**

1. The common carrier is bound faithfully to perform his duty, and he is responsible for the loss or damage resulting to the cargo confided to him, from neglect, imprudence, or want of skill, notwithstanding the stipulation to the contrary in the bill of lading. But in a case like this, where the shippers or their agents were present at the taking of the cotton on board the boat, and knew from the rain storm then prevailing, that the cotton must necessarily be exposed to the rain and mud, it would be inequitable to permit the owners or their consignees to recover from the boat or its owners, the amount of the damages occasioned by this exposure, when the agent of the shippers accepted the bill of lading, prepared by himself, containing the clause: "The boat not to be responsible for torn bagging, ropes or bands off, wet by rain, old damage or mud." *Newman & Co. v. Smoker, et al.*, 303.
2. Where it is contended that the defendants are not the first carrier or contractor, and that it is not proved that the error in the transmission occurred on defendants' line, on whose printed blanks there is express provision for non-liability for the default of other companies: Held—That, whether first carrier, or not, it was peculiarly within their power, and was their duty, to make the proof here suggested, if necessary.

*Lagrange v. Southwestern Telegraph Company*, 383.

3. Defendants were engaged in the business of transmitting messages to and from various points in the country, and found it to their interest, if not a necessity, to effect such mutual arrangements with other companies, without any consultation with the parties who might use the telegraph. It was in their power to show that the message delivered by them to plaintiff was precisely the same one received by them from another line, and thus throw the responsibility upon the other company, in case it should be held to be a correct legal principle, that one of two or more connecting companies may thus be relieved from liability. *Ibid.*
4. The proposition that the defendants are liable, if at all, only in case the message is repeated as contained in the printed conditions,

**CARRIERS—Continued.**

can be invoked only against the sender of the message, if against any. The receiver can be guided or informed solely by what is delivered to him, and has no opportunity to agree upon any such condition before delivery. *Ibid.*

**CORPORATIONS.**

1. Where it is clearly the purpose of the Legislature to give a company time within which they would have an opportunity to accept certain conditions imposed by that body, it can not be contended that official negligence in promulgating the law should make it impossible for such time to transpire, and thus deprive the company of the right and opportunity to accept; it would enable such official negligence to defeat the Legislator's will.

*State v. North Louisiana and Texas Railroad Company*, 65.

2. Where the defendant contended that the object of the original incorporators was to unite with the African Methodist Episcopal Church of the United States and be guided in the administration of its affairs by the doctrines and discipline of the general organization, and that, in accordance with said discipline, he was appointed by the Bishop of Louisiana pastor of St. James Chapel, and that he could not be discharged or dismissed from said position by the trustees or incorporators: Held—That under the charter of the corporation this right is expressly conferred upon the incorporators, and that, in the absence of any provision on the subject, they would have possessed the power, because it is one of the incidents of their ownership of the St. James Chapel.

*African Methodist Episcopal Church v. Clark*, 282.

3. The Straight University is not a public institution of learning in contemplation of article 140 of the State constitution.

*State ex rel. Straight University v. Graham*, 440.

4. A public institution of learning would be one which is controlled by the State through its agents, and in which the State would have a permanent interest and right of property, and which would depend upon the State for its existence. *Ibid.*
5. The Straight University was incorporated under the general statutes of the State as a private corporation. It is controlled by a board of trustees, who are only responsible for their management to certain private individuals. The State, through its officers or otherwise, exercises no control or direction over the university, nor has it any voice as to the manner in which it shall be conducted. It is not therefore a public institution of learning, and the constitutional objection to the appropriation made by the Legislature in its favor must prevail. *Ibid.*

SEE CONSTITUTION AND CONSTITUTIONAL LAW, No. 19—*Wisner's Curator v. Mayor and City Council of Monroe*, 598.

SEE ACTION, No. 16—*State v. New Orleans Gaslight Company*, 398.

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COURTS.

1. Where, before sentence was passed, a motion was made on behalf of the defendant in arrest of judgment, on the ground that the drawing of the grand jury was illegal, as shown by the minutes of the court, and where on the trial of said motion, the minutes were allowed to be corrected and a bill of exceptions taken thereto: Held—That the minutes can at any time be corrected to make them correspond with the truth, and being under the eye of the judge, who by law takes part in the proceeding, no evidence is necessary. *State v. Branch*, 115.
2. The grant of power to the Executive to remove an officer for a certain cause implies authority to judge of the existence of that cause. The power vested exclusively in Executive discretion can not be controlled in its exercise by any other branch of the government. *State v. Doherty*, 119.
3. Where the creditors of a succession opposed the final account of the administratrix of said succession, on the ground that a district court judgment for several thousand dollars in their favor was not placed on said account and paid: Held—That the administratrix could not, in the parish court, dispute the final judgment against her in behalf of the opponents; first, because a judgment not absolutely void can not be attacked collaterally; second, because the parish court can not revise a judgment of the district court, and also because the parish court can not determine a controversy when the matter in dispute exceeds \$500, for want of jurisdiction *ratione materiae*. *Succession of Meraday Neal*, 125.
4. The parish court charged with the duty of settling successions has nothing to do with the partition of property held in division, where the matter in dispute exceeds \$500. *Johnson v. Labatt*, 143.
5. The Supreme Court, where there is a doubt as to its jurisdiction, would maintain it in a case in which the whole people of the State are interested, and if this were necessary in order to protect them from what may be, and as in this case appears to be, a fictitious claim upon the common treasury. *State ex rel. Strauss v. Dubuclet*, 161.
6. Where parties claim title to lands acquired from the United States, after the general government has parted with its title, the courts will decide their rights under the law, without reference to the action of the officers of the land office. *Walsh v. Lallande*, 188.
7. This court can go behind the judgment of the court *a qua* to see when the obligations sued on arose between the parties. *Robert v. Coco*, 199.
8. Although this court has not the power to decide who are the members of the General Assembly, yet the judges thereof are bound

## COURTS—Continued.

to know what assemblage of men constitute the State Legislature, for they are bound to know what are the laws of the State in order to adjudicate upon the rights of the litigants under the law.

*State ex rel. Morgan v. Kennard*, 238.

9. The court will take judicial cognizance of that irregularity which renders the issuing of a commission null and void, as having been done in contravention of positive law. *Kemp v. Ellis*, 253.
10. This court will take judicial cognizance of the fact that on the fourth day of December, 1872, the date of the Warmoth commission to Knoblock, the official returns of the election had not been promulgated, and therefore that the issuing of the commission was a nullity. *Collin v. Knoblock*, 263.
11. No statute conferring upon the courts the power to try cases of contested elections or title to office, authorizes them to revise the action of the returning board. The only power the courts have under the intrusion into office law is to decide if one or neither of the contestants has a legal title to the office, and the commission of each is the evidence of that fact.

*State ex rel. Bonner v. Lynch*, 267.

12. Courts of justice in this State sit to enforce civil obligations only, and never attempt to exercise jurisdiction over those of a spiritual character. *African Methodist Episcopal Church v. Clark*, 282.
13. The law creating the Superior District Court authorized the judge thereof to do, in the cases transferred to it from the Eighth District Court which was abolished, what the judge of the latter could have done. Whether the appointment of either of said judges by the Governor was unconstitutional and void can not be determined in such a collateral manner as on a motion to dismiss.

*State v. Wharton et al*, 1.

14. Where the appointment of the judge was expressly authorized by the statute creating the court, as in the case of an original vacancy, whether this might or might not be sustained as constitutional, in a proper proceeding, is a question not to be settled in this case in which the judge is manifestly an officer *de facto* at least; and his acts must be recognized just as those of an officer *de jure*, until, upon a regular trial, he is disclosed not to be an officer. *Ibid.*
15. Where the claims of individuals come in conflict, it is the true province of the judiciary to decide what they rightfully are under the constitution and the laws, rather than to decide whether the constitution and laws have been rightfully or wisely made.

*Ibid.*

16. Where the property in controversy is situated in Louisiana, within whose limits the owners thereof reside, their rights can only be barred by the laws of this State, which are binding on the Federal

**COURTS—Continued.**

- as well as the State courts. The Federal courts do not claim to bring foreign laws into this State. *Fuentes v. Gaines*, 85.
17. A suit by the executor of a succession to compel the heirs of said succession who have been put in possession thereof, to pay the commission claimed by said executor, is properly brought before another court than the Second District Court, which has only probate jurisdiction. *Hale v. Salter*, 320.
18. Where counsel for appellee complained that, before this court should have set aside the verdict of the jury and remanded the case, it should have decided that their finding was erroneous: Held—That there was force in this criticism of the decree, and that a rehearing should be granted as prayed for. *Halliday v. Lanata*, 373.
19. As a sovereign, the United States is bound by the limitations of the federal constitution, and, of course, it can not appoint a judge to a State court, much less create a State court and appoint the judge to administer it. *Mechanics and Traders' Bank v. Union Bank*, 387.
20. The President, representing the United States in the exercise of its sovereign powers, could not create a court to decide any civil controversy. This could only be done by Congress under the limitations of the constitution. But, in the exercise of war powers, the United States is not restrained by the limitations which the constitution imposes on it as sovereign. *Ibid.*
21. When the United States captured the city of New Orleans in 1862, the civil government existing under the Confederacy, ceased to have authority. As an incident of war powers, the President had the right to establish civil government, to create courts to protect the lives and the property of the people. *Ibid.*
22. The General commanding the military forces of the United States which captured the city, had the right to establish the provisional court called the Provost Court, which rendered the judgment against the plaintiff in this case. That court had authority, temporarily, to decide all civil causes. *Ibid.*
23. The plaintiff, who paid under protest a judgment rendered by a competent court, established by the United States in the exercise of its war powers after the capture of New Orleans, has no cause of action against its judgment creditor for the money paid in pursuance of the decree of that court, and that judgment is validated by article 149 of the constitution of this State. *Ibid.*
- N. B.—This case has been carried to the Supreme Court of the United States by a writ of error.
24. This court is not authorized to declare theoretically an act of a co-ordinate branch of the government unconstitutional, when the

**COURTS—Continued.**

act complained of is not only not alleged to be interfering with the exercise of any person's rights, but not even in operation.

*State v. New Orleans Gaslight Company*, 398.

25. It is not for this court, or any other, to interfere with the discretion of the land officers of the United States in their transfer to whomsoever they may choose of the title of the United States to land. But if the United States, at the moment of the adjudication, had no title to the land in question, this action of the officers of the Land Department gave the plaintiff none; and the question whether the United States had any title at the time of the adjudication, is clearly a question for the courts of justice, and not for the officers of the Land Department, to decide. The plea of *res judicata* in this case is overruled. *Copley v. Dinkgrave*, 577.

SEE NEW TRIAL, No. 3—*State v. Socha*, 417.

SEE PRACTICE, Nos. 23, 24—*State v. Allemand*, 525.

SEE JURISDICTION, Nos. 9, 10—*Lay v. Succession of O'Neil*, 608.

**CODE OF PRACTICE.**

1. The provisions of the Code of Practice relating to oyer do not apply to a document filed in a cause in court.

*Cincinnati Insurance Company v. Harrison*, 1.

2. Article 613 of the Code of Practice, concerning prescription, clearly refers to a *judgment in a contested suit*, but which has been obtained through fraud, or because the defendant had lost the receipt given by plaintiff. *Fuentes v. Gaines*, 85.

**DONATION.**

1. Where it was contended that a donation *inter vivos*, made in 1858, by a white father to his two daughters who were born of a black woman, then a slave, but who, with their mother, were entitled to claim their liberty at a future time (*statu liberae*) was in violation of law and therefore null and void: Held—That the rights of the parties must be decided under the provisions of article 193 of the Code of 1825, and that under the circumstances of the case, the donation must be sustained, whatever may be the moral view of the question. *Fowler et al. v. Morgan*, 206.

**DIVORCE.**

SEE CIVIL CODE NO. 9—*Michel v. Weil*, 208.

**DAMAGES.**

1. A reparation by recantation can only be considered in estimating the amount of damages.

*Perret v. New Orleans Times Newspaper*, 170.

2. In an action of libel it is not necessary to prove any special damage to recover. *Ibid.*

3. Damages for a suit, unless malice is shown, can not be recovered.

*Coco v. Hardie*, 230.

**DAMAGES—Continued.**

4. When a driver attempts to pass another on a public road, he does so at his peril. At least, he must be responsible for all damages which he causes to the one whom he attempts to pass, and whose right to the proper use of the road is as great as his, unless the latter is guilty of such recklessness or even gross carelessness as would bring disaster upon himself.

*Avegno v. Hart*, 235.

5. Where it was objected to the claim for damages that the arrest of plaintiff on the ground that he was departing permanently from the State without leaving therein sufficient property to satisfy the demand against him, was not done with malice, but was the exercise of a mere legal right prosecuted in the form authorized by law, and, therefore, that the defendant could not be responsible in damages: Held—That this objection is not valid.

*Rogay v. Juilliard*, 305.

6. If it be conceded that a contract was violated willfully, or through carelessness, still the measure of damages would be the injury inflicted upon the plaintiff, where there is no *penal* clause in the contract.

*Bohn v. Cleaver*, 419.

7. Damages arising from the presumable profits of a speculation that was never made, are too uncertain for a court of justice to award.

*Ibid.*

SEE EVIDENCE No. 30—*Gordy v. Veazie*, 518.

SEE PRESCRIPTION Nos. 13, 14—*Lizardi v. New Orleans Canal and Banking Company*, 414.

**DEPOSIT.**

1. There is no reason why a deposit to the credit of an overdrawn account should not be fully as legal and unsuspicious as one on an account already credited with a balance. The discovery of an overdraft is the strongest possible incentive to an early deposit to make the account good. *Crescent City Bank v. Hernandez*, 43.

2. Where the defendant was sued for two mortgage notes left with him on deposit, and required to restore them or pay the full amount thereof: Held—That defendant disclaiming any ownership of said notes and having no personal interest in them, has no defense to set up for himself, and has no right to plead one for a third party and ask the court to pass upon a question that would not be binding if decided for or against that person. *Ducros v. Gottschalk*, 233.

3. The only privilege granted by law to the depositor is on the price of the sale of the thing deposited by him.

*Lanoue v. Dumartrait*, 478.

4. The law does not give a general privilege to the depositor, but simply on a particular movable. *Ibid.*

5. Where the funds deposited have been appropriated by the deposi-

**DEPOSIT—Continued.**

tary, and of course can not be identified, and the amount thereof or therefor is not due to the depositary by another, there is nothing subjected to the privilege. *Ibid.*

6. There is no law known to the court that allows the general privilege claimed by the plaintiff as depositor, on the property of the depositary's succession. Said succession, being insolvent, other creditors would be affected, and it seems that, to avail plaintiff's claim, if it exist, registry is necessary, but has not been made.

*Ibid.*

7. The depositary is bound to use the same diligence in preserving the deposit that he uses in preserving his own property.

*Levy v. Pike*, 630.

8. Where the deposit was a gratuitous one, and where the abstraction of the thing deposited seems to have been one of those bold and adroit acts which are carried out successfully in defiance of ordinary prudence and diligence, and the possibility of which is seen only after its accomplishment, the depositary is not liable, as he would be if the loss arose from gross or inexcusable negligence on his part.

*Ibid.*

SEE COMPENSATION No. 1—*Adams v. Webster*, 117.

**DOMICILE.**

1. Where citation is served personally on a married woman authorized to defend the suit, she is regularly in court, and on its being shown that she has a domicile in the parish, a notice to which she is entitled can be served on her personally, or at her said domicile, unless there is some special provision of law requiring another mode of giving the notice. *Holbrook v. Bronson*, 51.

*Ibid.*

2. It can not be contended on her behalf that, inasmuch as when the judgment was rendered and notice thereof served at her domicile, she was absent, or had gone out of the parish, it was necessary to appoint an attorney upon whom service of the notice of judgment should have been made.

*Ibid.*

3. A joint obligor can be cited at the domicile of his co-obligor.

*Adams & Co. v. Scott et al.*, 528.

**ELECTION LAWS.**

1. The law of the twentieth November, 1872, relative to elections, did not repeal the election law of 1870, which created the Board of Returning Officers, and did not destroy their office. It was merely a revision and re-enactment of the former with emendations. *State v. Wharton*, 2.

2. The provisions of the act of 1872 were intended to apply only to elections held under it after its passage, and by no correct or admissible rule of construction can its repealing clause be held to defeat an election had under the previous law, when the results thereof were not yet ascertained.

*Ibid.*

**ELECTION LAWS—Continued.**

3. The fifty-fourth section of the act of 1870, No. 100, relating to elections, repeals section 1430 of the Revised Statutes, being section No. 53 of the act of March 15, 1855, prescribing the mode of contesting elections, and the party commissioned under the provisions of said act of 1870 is *prima facie* entitled to the office he claims.  
*Hughes v. Pipkin*, 127.
4. Under sections 2595, 2605, R. S., relative to contested elections and the whole tenor of the intrusion law, defendant in the court below, and relator here on application for a mandamus, could waive the delay for answering and have a day designated for trial without waiting until issue was joined by said answer. Whether the nature of the defense developed in the answer when filed would have authorized a continuance on behalf of the plaintiff is not a question in this case. If the plaintiff is debarred from asking for a jury to be summoned and for a continuance to that effect, it is by his own fault. There was no legal and valid reason for continuing the case as was done, and the plaintiff had no right to a trial by jury as was accorded to him, inasmuch as he did not ask for one in his petition and procured the discharge of a jury that was present, to whose sufficiency and competency as jurors no objection was made, and by whom the defendant in the court below and relator here expressed a willingness to have his case tried immediately. Plaintiff's subsequent application for a jury was obviously for delay. The law makes this class of cases summary in form of proceeding. For these reasons the mandamus prayed for is made peremptory, and the judge *a quo* is ordered to set down relator's case for trial by preference over all other cases and without a jury on the second day of the regular term of his court, April 8, 1873, and to have notice thereof immediately given to the parties.

*State ex rel. Pintado v. Judge Fifteenth Judicial District*, 149.

5. The defendant having been returned by the legal returning board of the State as elected judge of the Fourth District Court of New Orleans, and upon that return the Acting Governor having issued a commission to him according to law, it can not be said that one holding an office under such a commission has intruded into, or unlawfully holds the office. *State ex rel. Bonner v. Lynch*, 267.
6. No statute conferring upon the courts the power to try cases of contested elections or title to office, authorizes them to revise the action of the returning board. The only power the courts have under the intrusion into office law is to decide if one or neither of the contestants has a legal title to the office, and the commission of each is the evidence of that fact.  
*Ibid.*

**SEE OFFICES AND OFFICERS, COURTS, GOVERNOR.**

**EMANCIPATION.****SEE MARRIAGE, Nos. 17, 18—*Pierre v. Fontenette*, 617.****EVIDENCE.**

1. The loss of an appeal bond being established, secondary evidence, either written or oral, may be introduced to procure the alleged signature of the defendant to the bond as surety.

*Cincinnati Insurance Company v. Harrison et al.*, 1.

2. Servitudes, when an act of sale is silent on the subject can only be shown by proof of the use or existence thereof for a period sufficient to establish title, and this may be proved by parol. All agreements in relation to such use may also be proved by parol, unless it is shown that they were reduced to writing.

*Machea v. Avegno*, 55.

3. The evidence in this case shows that the alleged servitudes were subject to the will of the owner of the property on which they were exercised, and that the owner or owners of the other property in whose behalf said servitudes were claimed to be established never acquired any legal title thereto.

*Ibid.*

4. Where an objection was made that there was in the record no authentic evidence of the costs of protests and copy of an act of mortgage: Held—That these costs were a part of those incident to the proceeding, and that, if authentic evidence of the amount thereof was necessary, the rule *de minimis* was applicable.

*Durac v. Ferrari*, 80.

5. The objection to the irrelevancy of evidence is a very weak one when the case is tried without the intervention of a jury. In such a case, the only question, in effect, is upon the sufficiency or weight of the evidence. If the evidence found in the record is irrelevant, it will be ignored by the court.

*Fuentes v. Gaines*, 85.

6. Where a will, when last seen was in the possession of the testator, and it could not be found at his death, the presumption of the law in such a case is, that the testator destroyed it *animo cancellandi*, and the *onus* of rebutting this presumption is cast upon those seeking to establish the will. The opinion or suspicions of a witness can not overcome the presumption raised that the testator himself destroyed the will.

*Ibid.*

7. The contents of a lost will can not be proved by witnesses who derived their knowledge from the verbal declarations of the testator. It would practically authorize the making of a verbal testament, and a lost testament could thus be proved by evidence which would be incompetent to prove the will if produced in court.

*Ibid.*

8. It is necessary to prove that a lost olographic will contains all the essentials prescribed by law before it can be admitted to probate, to wit: That it was wholly written, dated and signed by the

**EVIDENCE—Continued.**

- testator, and the witnesses must state the facts which are necessary to enable the court to determine whether or not the will is valid. *Ibid.*
9. The facts required to be established by article 1655 Civil Code for the probating of an olographic will must be proved by competent testimony, and can not be inferred by the court. *Ibid.*
10. Where an *ex parte* statement of account, annexed to the petition, was allowed to be received in evidence, and the books of the partnership, which had been kept by the plaintiff himself and offered by the defendant, were excluded: Held—That the court *a qua* erred. *Job v. Huer*, 279.
11. Where in a suit to erase the mortgage of a third party, said party alleged that the mortgaged property had never been individually owned by the debtor of the plaintiffs, and that, even if it had been the property of said debtor, which was expressly denied, the mortgage was binding and operative, and that no valid reason existed in law to have it canceled: Held—That the two pleas were not contradictory, and that the judge *a quo* erred in ruling defendant to elect between them, because it was competent for the party to prove that the property seized not belonging to the debtor of the plaintiffs, they had no right or interest to inquire into the validity of the mortgage resting on it; and because it was also competent for said third party to establish at the same time that the mortgage in his favor was valid. *Northern Bank of Kentucky v. Police Jury of Pointe Coupee*, 185.
12. The statements under oath, in a judicial proceeding, made as a party accused and not as a witness, are not to be held as voluntary and therefore are not admissible as evidence on the trial of said accused party. Where it was objected to the admission as evidence of a declaration in writing purporting to be a voluntary confession of the accused, on the ground that such a declaration was not voluntary, because it appeared on the trial of the case that it was doubtful whether or not inducements by the Superintendent of the Metropolitan Police had not been offered to the accused to make said declaration, and because under such circumstances, the accused was entitled to the benefit of the doubt; Held—That the Court below erred in overruling the objection. *State v. Garvey et al.*, 191.
13. Where the plaintiff excepted to the evidence of the defendant, who testified that he never received the money declared in the marriage contract to be the property of the mother of the plaintiff, nor did ever receive any property from her, or for her account, nor ever made the donation *propter nuptias* mentioned in the marriage contract: Held—That the objection should have been sustained,

**EVIDENCE—Continued.**

because the notarial act could not be contradicted by parol testimony.  
*Edwards v. Edwards*, 200.

- 14.** Where evidence was admitted because it was confirmatory and explanatory of the title filed in answer to the prayer for oyer, and did not constitute a new and independent title: Held—That the bill of exceptions thereto was not well taken.

*Irwin v. Peterson*, 300.

- 15.** Where the plaintiff, claiming for the use of A, judicially admitted that the insurance on a house was effected by him on behalf and for the benefit of said A: Held—That the court *a qua* erred in not permitting defendant to show that A had set the house on fire, and further erred, under the circumstances of the case, in not allowing defendant to prove plaintiff's declaration, after the fire, that the premises were not his and that he had never possessed any insurable interest therein, notwithstanding his title had been received in evidence.

*McCarty v. Louisiana Mutual Insurance Co. of New Orleans*, 354.

- 16.** Where a bill of exceptions was taken to the ruling of the judge *a quo*, refusing to permit evidence to be offered, on the trial of a motion in arrest of judgment, to prove that one of the jurors was an unnaturalized alien: Held—That said ruling was correct. Such motions must be based on errors patent on the face of the record. Besides, the juror having been accepted, the defendant could not, after conviction, complain of the want of qualification in the juror.  
*State v. Hardin*, 369.

- 17.** The court below also erred in compelling the defendant, who had pleaded the general issue, to plead payment before permitting him to introduce proof that he had settled in full with the plaintiff. Said plaintiff having alleged a final settlement, it was competent for the defendant to prove what that settlement was.

*Job v. Huer*, 279.

- 18.** Where Effingham Lawrence mortgaged half of a plantation to secure some promissory notes, said mortgage being in favor of Cassanave, or any other future holder of said notes, and the mortgaged property was subsequently transferred to Packard et als., who assumed to pay the said notes as part of the price, and the notes fell into the hands of Lee, who sued out an order of seizure and sale against the property, which order was enjoined by Packard et als.: Held—That on the trial of the injunction, the court *a qua* did not err, in permitting Lee to introduce the authentic evidence upon which the order of seizure and sale was granted; and also, that the court did not err, in refusing to allow Packard et als. to introduce in evidence a letter of Effingham Lawrence, the mortgageor, on the ground of irrelevancy.

*Lee v. Packard et als.*, 397.

**EVIDENCE—Continued.**

19. Where, on the admission of the tutrix of a minor child, judgment was rendered declaring the sale of a certain piece of property to the minor's father, now deceased, to be simulated, and reconveying the title to the plaintiff, and condemning him to refund whatever taxes the widow paid, and to pay costs, reserving the rights of the minor, whatever they may be: Held—That, although it is true the tutrix could make no admission which could bind the minor, yet that, as the law allows such suits and the proof of simulation by a *particular kind* of evidence, which, it seems, might have been, but was not adduced by plaintiff, he should be allowed an opportunity to furnish it, and not to rest under a cloud upon his title, which, it is probable from the facts in the record, could be removed, wherefore the portion of the judgment which "reserves the rights of the minor, whatever they may be," is reversed, and the case remanded for the purpose of allowing the plaintiff to introduce *legal* evidence as against said minor's rights, if any there be, to the property in question.

*Vinson v. Succession of Tompkins*, 437.

20. Where the defendant objected to the ruling of the court receiving in evidence a note and mortgage, on the ground that they were not stamped at the time of their execution, as required by law, and where it appeared that neither the notary before whom the act of mortgage was passed, nor the parties, had any stamps when the act was passed, and mention of the fact was made in the act, but that one of the plaintiffs went immediately to Opelousas, purchased the necessary stamps from the recorder, who placed them on the act and canceled them in the presence and at the request of the party: Held—That this was sufficient.

*Pavy & Co. v. Bertinot*, 469.

21. Where at the time a mortgage-bearing note was given, no stamps were affixed to it, but before the note was offered in evidence it had been stamped by the district United States collector of internal revenue, who collected the interest required by law and remitted the penalty, this was all the law required of the parties. *Ibid.*

22. Where in defense against plaintiffs' claim, an agreement with said plaintiffs in full satisfaction of the amount due them, was relied on by defendants on account of their tutorship, and a bill of exception was taken to its introduction in evidence, on the ground that an agreement of this nature could not be established by parol evidence: Held—That when all the parties are able to contract, if they did make a contract, there is no reason why it may not be proved by competent proof.

*Harris v. Keigler*, 471.

23. Where the defense to a promissory note was the prescription of five years, and several credits being indorsed on the note, oral

**EVIDENCE—Continued.**

- evidence was offered to prove that payments were made by the deceased at the dates indicated by the indorsements, the exception to the evidence was well taken. The plea should have been maintained.  
*Guillory v. Dejean*, 481.
24. The language: "I have no objection to the payment of the within note," is unambiguous, and the testimony to establish something else than is imported by the language, was properly excluded.  
*Millard v. Smith*, 491.
25. Parol evidence is inadmissible to prove an acknowledgment or promise of a deceased person to pay a debt, in order to interrupt prescription.  
*Ibid.*
26. Where promissory notes were offered in evidence, properly stamped, with the approval of the United States officer whose duty it was to stamp such notes, they were admissible, and it formed no part of the duties of the State court to inquire whether or not the United States officer had done his duty. It was sufficient to show that the notes were stamped with the approval of the said officer.  
*Levy et als. v. Loeb*, 496.
27. Where the plaintiff had been allowed to explain by parol the circumstances attending the seizure of which he complains, it was competent for the defendant to produce rebutting evidence in relation to the facts connected with the seizure, which did not tend to contradict, vary, or alter his written return on the order.  
*Mouton v. Broussard*, 497.
28. Where the act of sale, which was offered in evidence, contained the recital of a power of attorney, and the power was not denied, the act was sufficient to prove what it related.  
*Gant v. Eaton et al.*, 507.
29. Where plaintiff excepted to the ruling of the court *a qua* which permitted the defendant to establish by witnesses the value of certain items of the work sued on by plaintiff, on the ground that plaintiff having sued for the value of the work as a whole, without setting any specific value on its separate items, and the defendant having substantially accepted in his answer the issue presented, the testimony offered was not confined to said issue: Held—That the exception was not well founded. The sum total of the bill sued on being composed of various items, it was competent for the defendant to show by witnesses the separate value of each of the items which made up the aggregate work in order that the correctness of the general charge might be properly arrived at.  
*Gordy v. Veazey*, 518.
30. A party for whom work has been done on a certain building is not barred from offering any proof of damage on account of the unskillfulness of the work, because of his having taken possession of the building.  
*Ibid.*

**EVIDENCE—Continued.**

31. The testimony of a witness to establish that plaintiff had, before the instituting of his suit, presented to the defendant a bill in which he charged less for his work than the amount for which he has sued, was properly received. *Ibid.*
32. It is not proving title to lands by parol, when the sole object of the testimony is to prove where wood was cut, whether on the plaintiff's or defendant's lands, and such testimony should have been received in this case. *Grevenberg v. Borel*, 530.
33. Upon the question of the nature of the evidence necessary to prove a planting partnership, presented in defendant's bill of exceptions in this suit, the court knows of no law which requires the proof to be in writing. *Battle v. Jenkins*, 593.
34. Written acts which, by intendment of law, are clothed with solemnities in their execution, in order that they may become enduring records of past events, more surely to be relied upon than the frail memory of men, should not hastily be disregarded even upon the positive evidence of a single witness of their falsity, when such evidence is isolated, unsupported by facts *aliunde*, and given by the witness in his own behalf under strong influences of self-interest. *Puckett v. Law*, 595.
35. The assignment of error, upon which a reversal of the judgment is asked, that parol evidence was introduced to prove a promise to pay eight per cent. interest, is a ground to amend the judgment. *Gerspach & Herring v. Mullen*, 599.
36. The evidence of a documentary character offered by the Auditor to show that, at the time the contract relied on by plaintiff was entered into, the debt of the State was in excess of twenty-five millions of dollars, was improperly rejected. *State ex rel. Livingston v. Graham*, 629.
37. Where A as assignee of B sued C on an open account, and C alleged in answer that he had deposited with B a large sum of money before the transfer to A, which had not been accounted for, and pleaded compensation: Held—That C, under the pleadings, did not owe B the amount set out in the account sued on; that he could transfer to A only such rights as he possessed; that compensation took place, and that C should have the opportunity to show it. *Adams v. Webster*, 117.
- SEE CONTRACT, No. 12—*Lalanne v. Goodbee*, 481.
- SEE JUDGMENT, No. 29—*Grevenberg v. Borel*, 530.
- SEE EXECUTOR AND ADMINISTRATOR, Nos. 11, 12—*Succession of Leontine Guilbeau*, 474.
- SEE LAWS, No. 3—*State ex rel. Richardson v. Graham*, 73.

**ESTOPPEL.**

SEE SUCCESSION, No. 1—*Successions of Dunford and Remi*, 56.

SEE PLEADINGS, No. 2—*Sampson Brothers v. Townsend*, 78.

SEE HOMESTEAD, No. 1—*Le Blanc v. St. Germain*, 289.

**EXECUTOR AND ADMINISTRATOR.**

1. An administrator exceeds his proper functions when he enters into an agreement with the debtors of an estate to extend the terms of payment beyond that fixed by the original contract. The exercise of such a power by an administrator may be assimilated to acts done by agents which do not come within the purview of their powers, and which are therefore not regarded as binding on their principals. Therefore the defendants' plea in this case that they are not bound as sureties on the notes sued upon, for the reason that the plaintiff gave an extension of time to the principals without their knowledge and consent, is not well founded.

*Landry v. Delas et al.*, 181.

2. By the express terms of article 1671 of the Revised Code, the heirs can at any time take the seizin from the testamentary executor on offering him a sum sufficient to pay the movable legacies, and on complying with the requirements of article 1012.

*Sevier v. Sargent*, 220.

3. Whether the executor be discharged or not, the remedy of a creditor is not against him, but against the heirs who have been put in possession of the property of which they have become the owners and who are bound to pay the debts of the deceased, each his virile share.

*Ibid.*

4. A rule against an executor or a succession can not be taken after the succession has been closed and the executor has been discharged, nor can an order to sell succession property be granted after the heirs have been in possession subsequently to a partition among themselves.

*Sevier v. Succession of Gordon*, 231.

5. A suit by the executor of a succession to compel the heirs of said succession who have been put in possession thereof, to pay the commission claimed by said executor, is properly brought before another court than the Second District Court, which has only probate jurisdiction.

*Hale v. Salter*, 320.

6. The law gives to the executor a compensation for his services, and the heirs can not deprive him of it by causing themselves to be put in possession after the executor has accepted the trust and qualified.

*Ibid.*

7. Where it was contended by the heirs that the executor's claim for his commission had lapsed, because it was not demanded when the succession was turned over to them: Held—That if he did renounce his claim, his renunciation should have been express. It can not be inferred.

*Ibid.*

**EXECUTOR AND ADMINISTRATOR—Continued.**

8. Where the heirs contended that they could not be called upon to pay plaintiff's claim, because the law provides that the commissions of executors are based on an inventory, and no inventory was taken in this case, wherefore there are no means by which the amount due to the plaintiff can be ascertained: Held—That the heirs can not by their own act prevent the executors from taking an inventory, and then refuse to pay them their commission. The executor should be allowed to show the value of the succession *aliunde.* *Ibid.*
9. Where letters testamentary have been issued by a court of competent jurisdiction to two executors, on their complying with the requisites of the law, and one of them takes the oath well and faithfully to perform his duties, as executor, and the other does not, the one who has not taken the oath is presumed to have renounced the trust, and the one who has qualified is entitled to the entire commission. *Ibid.*
10. Where there was no necessity for a citation, but where the plaintiff and opponent had been formally summoned by the defendant, to oppose his account as executor of a succession, if he thought proper, and to present his opposition within ten days; Held—That said defendant could not invoke judicial action in the matter to the prejudice of plaintiff and opponent before the specified day had expired. Hence, the order of homologation having been rendered after three days delay only, was null, and no action of nullity is necessary to set it aside. *Succession of Hogan*, 331.
11. Where the administrator of a succession, within six days after his appointment, gave bond and entered upon the discharge of the duties of his office, and so continued to the knowledge of the creditors and heirs until the expiration of nearly two years, when, upon the *ex parte* application of some of the heirs and the husband of the deceased, his appointment was canceled on the ground "that he failed and neglected to give the security or give the mortgage required by law, and that more than ten days had elapsed since his appointment," and one of the said heirs prayed to be appointed administrator—to which said administrator filed an opposition and prayed for the annulling of the order canceling his appointment: Held—That the exceptions to the introduction of evidence to prove the inability of the administrator at the date of the bond, to furnish sureties in the parish of the succession, and to establish the sufficiency of the sureties on the said bond, could not be sustained. *Succession of Guilbeau*, 474.
12. The administrator having already been removed by an *ex parte* proceeding, and being, by the pleadings thus forced upon him, put in the position of the attacking instead of the assailed party,

**EXECUTOR AND ADMINISTRATOR—Continued.**

- and to avoid multiplicity of suits, if for no other reason, the court would be inclined to permit him to do what he might have the right to do in a direct action for his removal, based on the ground of the alleged irregularity and insufficiency of his bond. Besides, the object of the evidence offered and excepted to was to enable the judge *a quo* to execute the law authorizing him to pass on the sufficiency of the security of persons residing out of the parish, and to acquire such proof as he might deem necessary. *Ibid.*
13. Where the administrator had been appointed, had qualified, furnished a bond, and caused inventories to be made, if there is any informality or insufficiency in such acts or proceedings which would authorize a removal, this could be accomplished only in a direct action by petition and citation. The bond, as furnished in the first instance, was not a nullity. There was, at least, a *prima facie* compliance with the requirements of the law, which should have been regularly attacked if deemed insufficient. *Ibid.*
14. An acknowledgment and promise to pay by an administrator is not an acknowledgment and promise by the debtor himself or by his specially authorized agent, even if the draft given by the administrator for the payment of the judgment, with the right of subrogation to the drawee, can be regarded as an acknowledgment and promise to pay the judgment. It is not considered that the draft amounts to such a promise. *Succession of Hardy*, 489.
15. The language, "I have no objection to the payment of the within note," is unambiguous, and the testimony to establish something else than is imported by the language was properly excluded. Besides, such an indorsement, as above mentioned, on the note of a deceased person, was not an engagement on the part of the administratrix of the estate to pay the debt. This is immaterial, however, as the note was prescribed at the time of said indorsement. *Millard v. Smith*, 491.
16. The account rendered to the heir being a copy of the one previously homologated, contradictorily with the creditors, is *prima facie* correct. *Succession of Caballero*, 646.
17. If the items thereof were exorbitant and undue, the opponents should have administered proof to overcome the presumption of correctness existing in favor of the accountant by reason of the judgment of homologation. This has not been done. Illegal charges, however, apparent on the face of the record, can be corrected. *Ibid.*
18. An executor can not keep in his hands the funds which, according to law, he was bound to deposit in bank, on the plea of retaining only the amount of a legacy due to him, when the testamentary disposition in his favor, by the express terms of the will, was to

**EXECUTOR AND ADMINISTRATOR—Continued.**

be discharged out of a particular fund in Havana, Island of Cuba, of which he had not the seizin. The funds in controversy in this case were not derived from that source, and ought not to have been retained and used by the executor. *Ibid.*

19. The sureties of the executor not having been cited and not appearing in this suit, the judgment rendered against them was annulled on rehearing. *Ibid.*

SEE PRACTICE, No. 25—*Succession of Romero*, 534.

SEE TUTOR AND TUTORSHIP AND SUCCESSION.

**EXECUTION AND EXECUTORY PROCESS.**

1. In executing the process of court the sheriff had no right to incur costs for advertising in other papers than the official journal.

*City of Baltimore v. Parlange*, 335.

2. To complete the seizure in this case, the sheriff of the parish of Orleans was not bound to take corporeal possession of the property and appoint a keeper. The seizure was completed by registering the notice. *Ibid.*

3. The charge for appraisers' fee was properly rejected, because prohibited by article 671, C. P. The item of costs for plan and survey was also unauthorized. The charges for city and State taxes on the property were correctly made. It was the duty of the sheriff to pay them out of the proceeds of the property sold. *Ibid.*

SEE SHERIFF AND SEIZURE.

**EXEMPTION FROM TAXATION.**

SEE TAXATION, Nos. 26 and 27—*Whited v. Lewis*, 568.

**EXEMPT FROM SEIZURE.**

1. The property exempted from seizure and sale by section 1691, Revised Statutes of 1870, is predial and not urban. The general rule is, that the property of the debtor is the common pledge of his creditors. Exemption laws create exceptions to this general rule which are not to be extended beyond the express terms of the lawgiver. *Crilly v. Sheriff et al.*, 219.

**FACTORS AND COMMISSION MERCHANTS.**

1. A factor can not secure his individual creditor by pledging the planter's cotton which has been confided to him for sale. That power is not conferred by act No. 150 of the acts of 1868, entitled "An Act to prevent the issue of false receipts or bills of lading and to punish fraudulent transfers of property by cotton presses, wharfingers and others." There is nothing in the statute showing any intention of the legislator to enlarge the powers of factors, or to give them the right to pledge the property confided to them for sale. *Young v. Scott & Cage*, 313.

**GOVERNOR.**

1. The Governor is not vested with the extraordinary discretion to determine who are the returning officers under the law.

*State v. Wharton et al.*, 2.

2. The Governor is not vested by the act of 1872 with authority to appoint the officers of the returning board of election. *Ibid.*

3. The Governor was wholly without legal right to suspend or remove the Secretary of State *de facto*, recognized as such by a court of competent jurisdiction and by himself. *Ibid.*

4. The extrusion and exclusion of Bovee, the Secretary of State *de jure*, from said office by the Governor, did not and could not vest in the Governor the control of the office with the right to put in and put out the occupants thereof at his pleasure. There was no vacancy in the office of the Secretary of State, Bovee, the incumbent *de jure*, who was only excluded or suspended, and whose office was in the meanwhile filled by Herron, the Secretary of State *de facto*; and yet Wharton was appointed Secretary of State without reference to any removal or vacancy. The commission is without effect. *Ibid.*

5. The grant of power to the Executive to remove an officer for a certain cause implies authority to judge of the existence of that cause. The power vested exclusively in Executive discretion can not be controlled in its exercise by any other branch of the government.

*State v. Doherty*, 119.

6. It does not follow that, because the State has appealed through the Attorney General, she can not appeal through the Governor as well. He clearly has the right to appeal on behalf of the State, and this right can not be taken away from him, simply because another officer of the government has been before him, when he takes the appeal within the delays required by law. In this case the appeal was taken in ample time.

*State ex rel. Strauss v. Dubuclet*, 161.

7. It is not legally correct to say that no person is authorized to appeal on behalf of the State, except in cases where the Attorney General is unable or unwilling to act. The prohibition is limited to the employment of counsel other than the Attorney General by the Treasurer and Auditor, and does not exclude the Governor from doing so. *Ibid.*

8. The constitution authorizes the Governor to convene the Legislature on extraordinary occasions. There is no reason, therefore, to maintain that article 61 of that instrument refers only to the regular or annual sessions of the General Assembly in relation to executive appointments. *State ex rel. Morgan v. Kennard*, 238.

9. The Warmoth commissions that were issued before the general election returns were reported and promulgated by the returning officers of the State, are null and void. *Kemp v. Ellis*, 253.

**GOVERNOR—Continued.**

10. A commission issued by the Governor must be recognized as having legal force, when it bears *prima facie* evidence of genuineness and validity, and nothing to the contrary is shown. *Ibid.*
11. This court will take judicial cognizance of the fact that on the fourth day of December, 1872, the date of the Warmoth commission to Knoblock, the official returns of the election had not been promulgated, and therefore that the issuing of the commission was a nullity. *Collin v. Knoblock*, 563.
12. For certain reasons expressed in the statute of 1871, p. 126 of acts of 1871, prescribing the duties of tax collectors, the Governor is authorized to remove a tax collector from office. The relator in this case having a commission bearing date a month later than the commission of Yoist, the presumption is that the Governor had cause for removal of the latter, which was effected by the appointment of Dayries. *State ex rel. Dayries v. Yoist*, 396.
13. The Attorney General having neglected or declined to take an appeal, after having intervened and gone into the defense of the case, adopting the defense made by the Auditor and superadding grave objections to the relator's claim, it became the duty of the Governor, under this condition of affairs, to take, in the interest of the State, the appeal which he did.

*State ex rel. Livingston v. Graham*, 629.

**GOVERNMENT OF THE UNITED STATES, ITS WAR POWERS.**

SEE COURTS, No. 19 to 23—*Mechanics and Traders' Bank v. Union Bank*, 387.

**GARNISHEE.**

1. The garnishee is a stakeholder, and on his answers the judgment should be for or against him. He has no interest in the contest between the creditor and debtor. But where the object of a motion to strike out part of the answers of the garnishee and of the traverse of the answers, is to attack the settlement made between the garnishee and the judgment debtor, the garnishee must be permitted to explain that he holds the thing attempted to be seized, by virtue of a title acquired by a settlement between himself and his debtor. The plaintiff can not be allowed to change his garnishment process into a revocatory action. His remedy is by a direct action. The garnishee can not be divested of his possession and alleged ownership through any process which would deprive him of explanations and defenses allowable in a direct action by the judgment debtor to recover his property.

*Hodges v. Graham, Hodges & Co.*, 365.

**HOMESTEAD.**

1. The benefit of the homestead act can be pleaded in bar of the foreclosure of a conventional mortgage given on the homestead sub-

**HOMESTEAD—Continued.**

sequent to the enactment of the law. It can not be rightfully contended that, in consenting to the mortgage, the plaintiff in injunction waived the benefit of this exemption, and that it amounted to a renunciation of the right. No one is presumed to waive a legal right, and every contract is supposed to be made in reference to the law that governs it. In this case there was no express renunciation or waiver.

*Leblanc v. St. Germain*, 289.

2. Where a widow, in necessitous circumstances, opposes the administrator's account of a deceased husband's estate, claiming that she is entitled to one thousand dollars under the homestead act, and it appears that the children own more than one thousand dollars in their own right, the widow does not come within the provisions of the statute.

*Succession of Melançon*, 535.

SEE LAWS, No. 9—*Mills v. Sheriff of East Feliciana et al.*, 142.

No. 13—*Robert v. Coco*, 199.

**HEIRS.**

SEE SUCCESSION, EXECUTOR AND ADMINISTRATOR.

**HUSBAND AND WIFE.**

SEE MARRIAGE.

SEE COMMUNITY.

**INSURANCE.**

1. A river policy of insurance, No. 208, was executed in favor of A on the first of February, 1867, according to all the forms prescribed by the charter and by-laws of the company. The insurance was "on account of whom it may concern, on such property lost or not lost, and in such sums, to and from such ports or places, and by such good and seaworthy steamboats or other river craft as may be approved by the company and entered in the book attached to the policy; it being expressly understood and agreed that no risk under this insurance is or shall be binding unless so approved and entered." Subsequently, on the fourth of same month, A, under the open river policy No. 208, made a special application, which was accepted, to have all the merchandise shipped to him on the Ohio and Mississippi rivers and their navigable tributaries, covered without being entered in the book attached to the policy, the risk on any one boat being limited to \$5000, and he binding himself to report the shipment as soon as notice thereof was received by bill of lading or otherwise. On the ninth of April, A had an entry made in the book attached to his policy by which merchandise shipped to him from Montgomery on the Alabama river was covered. The merchandise had been burned on the seventh of same month, but A had no knowledge of the fact at the time of the entry: Held—That the entry was regularly made and within the terms of the open policy; that said policy author-

**INSURANCE—Continued.**

ized the risk from the port of Montgomery, on the Alabama river; and that the special application was an additional agreement containing certain stipulations, none of which modified the open policy so as to limit the risks to the Ohio and Mississippi rivers and their navigable tributaries.

*Marx v. National Marine Fire and Insurance Company*, 39.

2. Where the stipulation is that the property to be insured shall be covered, lost or not lost, and no fraud has been established against the insured, the contract of insurance becomes operative and covers the property whether lost or not lost at the time of the entry.

*Ibid.*

3. Where the suit was on promissory notes given as premiums on policies of insurance to a company, and the plea in defense a want of consideration, on the ground that the policies, if issued, were not in accordance with the instructions from the party intending to be insured to the agents of said company, and did not cover the risks stipulated in the application; and where the issue was that the policies never were issued and delivered to the applicant, the proofs, which should be in the possession of the plaintiff, not being found in the record, there will be a judgment of nonsuit.

*Eureka Insurance Company v. Tobin et al.*, 121.

4. Where an insurance company notified the insured that a forfeiture would not be claimed for non-payment of assessments, till thirty days after the publication of a notice of the call, for eight consecutive days, the said company should have made the publication and given the delay, because the insured had the right to expect it, and is presumed to have acted upon it.

*Fitzpatrick v. Mutual Insurance and Benevolent Life Association of Louisiana*, 443.

5. As the forfeiture of legal rights is not favored by the courts, the terms or conditions upon which a forfeiture shall happen must be strictly complied with.

*Ibid.*

SEE SHIPPING, No. 1—*Hanan & Richards v. Bowles*, 453.

**INDICTMENT.**

SEE CRIMINAL LAW AND PRACTICE.

**INJUNCTION.**

1. A mortgage creditor has no right to injoin the sale of his debtor's property for want of notice of the application for the order, when the sale was ordered to pay creditors having a higher rank, or a preference over him. *Wells v. Wells*, 194.
2. Where creditors, who were by judgment entitled to be paid by preference, intervened, and joining in the defense made by the executor of an estate against the injunction issued at the prayer of a creditor of an inferior rank, asked that the judgment be so

**INJUNCTION—Continued.**

- amended as to allow them twenty per cent. damages on their claims: Held—That they were not entitled to any increase of the amounts allowed them respectively on the executor's tableau. No act of one creditor, however illegal, can be the basis for enlarging the claims of other creditors against the common debtor, the succession. But the plaintiff who, by injoining, has illegally obstructed the sale provoked by the executor, is liable to the succession for damages, and the prayer of the executor for an amendment of the judgment should be granted. *Ibid.*
3. The impracticability of the proceeding prescribed by law and the imposing of the cost thereof upon the purchaser of lands sold for taxes, are not good grounds for an injunction on the part of the taxpayer. The consequences referred to will rest with the State and the purchaser. *Gay v. Hebert*, 196.
4. An injunction will not be set aside for irregularities when it appears from the face of the papers that another would be issued. *Dupré v. Swafford*, 222.
5. Where it was pleaded that an injunction ought to be dissolved, because the party applying for it as tutrix set forth in her petition grounds which could have been urged in the defense to a petitory action against her individually: Held—That the plea is not valid. *Ibid.*
6. On the plea that a tutrix can not authorize another person to bind the minors on an injunction bond: Held—That it is the duty of a tutrix to protect the rights of her wards, and if, in the accomplishment of that duty, it becomes necessary to execute a judicial bond, she has the right to do so. *Ibid.*
7. The purchaser of mortgaged property with the pact *de non alienando*, occupies no better position than the mortgageor, and can not injoin the executory proceedings, or set up any defense which the latter could not. *Lee v. Packard et al.*, 397.
8. The plaintiff had no right to use the remedy of injunction in connection with his devolutive appeal, for the purpose of gaining the advantage of a suspensive appeal. There is neither law nor precedent for it. *Naughton v. Dinkgrafe*, 538.
9. A district judge can not revise his decrees, by an injunction, on the ground of the insufficiency of proof. A new trial and an action of nullity are the only modes by which he can revise his judgments. *Ibid.*
10. After an execution is enjoined and a suspensive appeal taken from the judgment dissolving the injunction, the court is without power to order the sale of any part of the property under seizure and the proceeds to remain in the hands of the sheriff pending the appeal.

*State ex rel. Mahan v. Judge of Fifth District Court, parish of Orleans*, 666.

**INJUNCTION—Continued.**

11. The injunction bond is presumed to be ample protection to the plaintiff in execution, and until the injunction is finally determined, all proceedings in the case are suspended, except in regard to the appeal bond. *Ibid.*
12. While it is a general rule that petitions in injunction suits are not allowed to be amended, still when events have occurred since the institution of the suit, which would warrant a new injunction, there can be no good reason to refuse them to be stated in a supplemental petition. *Howard et al. v. Simmons et al.*, 668.
13. Courts abhor a multiplicity of suits, and they will not dissolve an injunction when it is apparent from the record that the party would be entitled to another. *Ibid.*

**JUDGMENT.**

1. It was immaterial at whose instance the judgment was signed. The law requires the judge to sign all definitive judgments. *State v. Wharton et al.*, 2.
2. When by the terms and conditions of a lease two lessees are bound *in solido*, a judgment from the court *a qua* against them jointly will be set aside, and if the judgment against one of the parties to the lease never had any legal force, it remains in full force against the other. *Moussier and Courcelle v. Gustine and Sauvinet*, 36.
3. It can not be contended on the part of defendant that, inasmuch as when the judgment was rendered and notice thereof served at her domicile, she was absent or had gone out of the parish, it was necessary to appoint an attorney upon whom service of the notice of judgment should have been made. *Holbrook v. Bronson*, 51.
4. The judgments in this case appointing a testamentary tutor and the mother of minors their natural tutrix were not absolute nullities, and can not be attacked collaterally. Where a divorced wife marries again, and after the death of her first husband claims to exercise her rights of tutorship by nature over the issue of her first marriage: Held—That the forfeiture announced in article 254 of the Revised Code has no application to her case. *Succession of Pinniger*, 53.
5. Where the claim by plaintiffs was to be reimbursed their own money, that was appropriated to the payment of a judgment for which the owners of a certain piece of property were liable, and which was rendered contradictorily with them: Held—That the payment of that judgment carried with it a legal subrogation of the plaintiffs to that judgment. *Mississippi and Mexican Gulf Ship Canal Co. v. Noyes et al.*, 62.
6. Where the demand was for the return and annulment of three hundred bonds alleged to have been issued after default, on its

**JUDGMENT—Continued.**

- being proved that no such bonds were issued, a final judgment will be given, as insisted on by defendants, instead of one of nonsuit. *State v. North Louisiana and Texas Railroad Company*, 65.
7. Where, in a judgment, the court that rendered it carefully guarded against any inference being drawn that the decree should not be open to attack by a direct action in the name of interested third parties, the plea of *res judicata* does not lie. *Fuentes v. Gaines*, 85.
8. An *ex parte* order admitting a will to probate is not a judgment binding upon those who are not parties to the proceeding. The *ex parte* order for the recording and execution of the will is a preliminary proceeding for the administration of an estate, if not a final judgment which concludes every one. It is a mere license to authorize the executor or heir to carry out the provisions of the testament; and the verity and validity of the will must be established whenever questioned by third persons from whom property is judicially demanded under the will. *Ibid.*
9. Article 613 of the Code of Practice, concerning prescription, clearly refers to a *judgment in a contested suit*, but which has been obtained through fraud, or because the defendant had lost the receipt given by the plaintiff. Article 1994 Civil Code applies to acts made in fraud of creditors. *Ibid.*
10. The title to property can not be attacked collaterally, and where a judgment creditor seizes property as belonging to his judgment debtor, but the title to which stands in the name of another, he assumes the burden of showing simulation. *Pierce v. Clark and Sheriff*, 111.
11. A judgment of nonsuit based upon the mere failure of a plaintiff to appear, can not be regarded as a voluntary abandonment of the claim. The suit was sufficient to interrupt prescription. *Locke v. Barrow*, 118.
12. Where the suit was on promissory notes given as premiums on policies of insurance to a company, and the plea in defense a want of consideration, on the ground that the policies, if issued, were not in accordance with the instructions from the party intending to be insured to the agents of said company, and did not cover the risks stipulated in the application; and where the issue was that the policies never were issued and delivered to the applicant, the proofs, which should be in the possession of the plaintiff, not being found in the record, there will be a judgment of nonsuit. *Eureka Insurance Company v. Tobin et al.*, 121.
13. Where a judgment by default was entered before the delay required by law had expired, it will not be maintained as valid on the ground that it was not made final until after the usual delays and

**JUDGMENT—Continued.**

- that the defendant, having thereby suffered no injury, can not complain. *Hart & Co. v. Nixon & Co.*, 136.
14. There is no difference between entering a default a day too soon and confirming a default a day too soon. One delay is as imperative as the other. *Ibid.*
15. There is no issue joined when the judgment by default has been improperly entered, and the judgment in confirmation has nothing to rest upon. *Ibid.*
16. Where it was contended that two judgments were not properly revived, only one petition for revival thereof being filed, and in one judgment the revival of said judgments being decreed: Held—That the prescription of the judgments was properly interrupted, because citation was served personally within ten years. Whether the application was made in one petition or two is immaterial. The decree of revival for both judgments was rendered contradictorily with the defendant, who was personally cited within ten years. There is no law requiring this decree arresting prescription to be registered. *Carrol, Hoy & Co. Scip et al.*, 141.
17. A judgment by default, to become executory, must be notified to the defendant, and the delays from which the right to appeal begin to run must date from the day on which the defendant was notified of the judgment. *Taylor v. Woodward et al.*, 212.
18. It is the settled jurisprudence of this court that there is no authority for rendering a judgment against the defendant in a suit on a promissory note given for the purchase of a slave, guaranteed to be such for life, but subsequently set free by the Government of the United States. *Bruin v. Sasser*, 224.
19. Where a rule was taken on the holder of a judicial mortgage and on the recorder of mortgages to show cause why said judicial mortgage should not be canceled and erased, on the ground that the notes on which the judgment was founded were given in part payment of the price of a slave: Held—That the judgment was *ab initio* void. The court was without power to render it, the notes were illegal and invalid, and the judgment in which they merged necessarily so likewise. *Consolidated Association of Planters of Louisiana v. Blanc*, 226.
20. The return of the service of judgment by the sheriff was not viatized by his calling it in said return a writ of judgment, nor was it indispensably necessary that the copy of the judgment should have contained the signature of the judge; nor was it sacramental that the clerk should have mentioned that the judge had signed the judgment. All that was required was notice of the judgment, and the certificate of the clerk that the judgment was rendered was sufficient. *City of New Orleans v. Crescent Mutual Insurance Company*, 390.

**JUDGMENT—Continued.**

21. Where the plaintiff was not a party to any of the judgments complained of, and this is the first suit he has brought to have them annulled and to get the relief he prays for, an exception founded on the plea of *res judicata* is inapplicable.  
*Succession of Milton Taylor*, 446.
22. A party acquiescing in and voluntarily discharging a judgment before appealing, can not recover the amount paid in satisfaction thereof.  
*Winston v. Nunez*, 476.
23. It is no ground to reverse a judgment, if correct, because the judge *a quo* gave wrong reasons, or because the decree does not conform to the reasons given by him.  
*Seyburn v. Dayris*, 483.
24. Where a judgment was rendered for more than the petition claimed, the *remittitur* should have been entered before the judgment was signed, and should have appeared in the transcript.  
*Gantt v. Eaton et al.*, 307.
25. A judgment can, of course, be enforced pending a devolutive appeal, and the reversal of the judgment in no manner impairs a sale made under the execution, but the right of the successful appellant is against the proceeds.  
*McWaters v. Smith*, 515.
26. If a sale should take place pending a devolutive appeal, and said appeal be taken within twelve months, it is considered pending from the time when the judgment was rendered. The judgment can not have effect on the thing sold, but operates on the proceeds. The plaintiff is entitled to the amount of the difference between the proceeds of the sale of her property pending the appeal and the amount of the final judgment obtained.  
*Ibid.*
27. Where in an action to annul a judgment obtained by defendant against the plaintiff on a promissory note, which judgment was affirmed on appeal to this court in 1869, it appears that the consideration of the note was the price of a slave purchased on the tenth of October, 1861, this is sufficient ground for setting aside the judgment which is sought to be annulled.  
*Lindstrum v. Ewing*, 520.
28. Judgment was rendered in this case on the fifteenth of January, 1861, decreeing that the defendant deliver up a slave to be sold in satisfaction of the plaintiff's claim, \$821, with interest, or in default thereof to pay the said sum and interest. It is clear that there can be no recovery in this case, the plaintiff having set out by endeavoring to enforce a mortgage against a slave who has since become free. The parties called in warranty to make good the title to the slave are no longer bound.  
*Dejean v. Arnaud*, 521.
29. The verdict and judgment in favor of defendant is erroneous. The plaintiff having failed to make out his suit, the evidence only justified a nonsuit.  
*Grevenberg v. Borel*, 530.

**JUDGMENT—Continued.**

30. A judgment ordering the sale of succession property to pay an unliquidated claim against the heirs, is a mere nullity.  
*Miguez v. Delahoussaye*, 531.
31. A judgment ordering the partition of succession property is invalid when one of the heirs has not been a party to the suit. *Ibid.*
32. A party has no right to demand the nullity of a judgment rendered against him, because the attorney who acted on his behalf was without authority, after permitting that attorney to continue the litigation, and after taking the chances of a favorable judgment in this court.  
*Willis v. Wansley*, 588.
33. Act No. 95, approved March 8, 1869, was passed, as its title announces, to carry into effect article 123 of the State constitution of 1868. The judgment which, in this instance, is the act of adjudication, stipulating the amount of the property held in common with a minor and adjudicated to her mother, was duly recorded in the book of mortgages, and was a compliance with the said law.  
*Winter v. Touvoir et al.*, 611.
34. The prescription of ten years set up by defendants does not apply to said judgment of adjudication. The judgment is not and was never intended by the law to be a judgment for money against the natural tutrix, upon which execution could issue in favor of the minor.  
*Ibid.*
35. The amount, however, of plaintiff's claim, so far as secured by mortgage, must be reduced, as it is shown that a portion of it was for the price of slaves adjudicated with lands. It was a sale, the price of which is still unpaid. The question has already been settled by this court, and is now jurisprudence.  
*Ibid.*
36. Where certain funds belonging to A were sequestered in the hands of B, his agent, at the suit of C, and said funds were paid to C, by virtue of a judgment which was not appealed from: Held—That the payment was good against A, who could not recover the amount from B, on the plea that he was not cited, and therefore was not bound by the judgment, because it was proved that he had ample notice and knowledge of the proceedings. He needed not the permission of B, his agent, and the garnishee in the suit, to appear in said suit, and could have appealed from the judgment, had he seen fit to do so. Under the circumstances of the case, as they appear in the record, B can not be forced to pay to A what he was compelled to pay to A's creditors by a court of competent jurisdiction.  
*Guidry v. Jeanneaud*, 634.
37. Judgment dissolving an injunction against an order of seizure and sale without damages is simply a judgment of nonsuit, and seems naturally to blend itself with that ordering the sale; or, in other terms, it is in substance a repetition of the order first granted.  
*State ex rel. Richardson v. Judge Fourteenth Judicial District Court*, 653.

**JUDGMENT—Continued.**

- 38.** Where the irregularities in the proceedings in the court *a qua*, which are complained of, are more technical than real, and where, on the whole, substantial justice has been done, the judgment will not be disturbed. *Howard et al. v. Simmonson et al.*, 668.

SEE EVIDENCE, Nos. 16, 20—*State v. Hardin*, 369.

No. 35—*Gerspach & Herring v. Mullin*, 599.

SEE EXECUTOR AND ADMINISTRATOR, No. 14—*Succession of Hardy*, 489.

SEE INJUNCTION, No 9—*Naughton v. Dinkgrave*, 538.

SEE CONSTITUTION AND CONSTITUTIONAL LAW, No. 10—*Morrison v. Flournoy*, 545.

SEE APPEAL, Nos. 43, 44—*State ex rel. Richardson v. Judge Fourteenth Judicial District Court*, 653.

**JOINT OWNERS.**

- 1.** Where one of the joint owners of property claims from the other parties commissions for collecting rents and keeping the premises in repair, he must show an agreement on which to base his charge.

*Conrad v. Burbank*, 112.

- 2.** Where the plaintiff, alleging that the succession represented by him was the joint owner with the defendant of a steamboat, sued to have the right of the succession recognized and for its share in the net earnings of the boat while in the possession of the defendant, and said defendant excepting that, if the plaintiff had any rights, which is denied, the present suit was not the form in which they can be asserted, contended that said plaintiff must sue for a general settlement, the exception must be overruled.

*Labit v. Francioni*, 488.

- 3.** The mere fact of being joint partners of a steamboat did not constitute plaintiff and defendant owners, when there is in the record no evidence of partnership. *Ibid.*

- 4.** Plaintiff is entitled to claim his right to the boat if he be a joint owner, and if he has asked for a share of the earnings of the boat, instead of the price of the use of his property, it does not follow that he will get it, or that he is therefore a partner. *Ibid.*

**JUSTICES OF THE PEACE.**

- 1.** The jurisdiction of justices of the peace for the parish of Orleans is conferred by section 2074, page 414, Ray's Revised Statutes. It is confined to civil matters, and there is no other law conferring upon them criminal jurisdiction.

*State ex rel. Saddler v. Landry*, 60.

**JURIES AND JURORS.**

- 1.** A motion for a new trial can not be refused "with a view of allowing the Supreme Court to pass upon the rights of the parties, under the conviction that it is more than useless to put the parties

**JURIES AND JURORS—Continued.**

- to additional and unnecessary expense by submitting the case to another jury which would be composed as the one which tried the case under existing laws." This mode of proceeding and such strictures made in advance on the jury to which it might be submitted, can not be sanctioned. *Adams v. Webster*, 113.
2. Where the judge in a lower court is satisfied that the verdict of a jury is wrong, it is his duty to grant a new trial and not indirectly deprive the party of a trial by jury, by rendering what he believes to be an improper and unjust judgment with the view of having it revised on appeal. It might be that the verdict, on a second trial, would prove satisfactory to both parties. *Ibid.*
3. Where, before sentence was passed, a motion was made on behalf of the defendant in arrest of judgment, on the ground that the drawing of the grand jury was illegal, as shown by the minutes of the court, and where, on the trial of said motion, the minutes were allowed to be corrected and a bill of exceptions taken thereto: Held—That the minutes can at any time be corrected to make them correspond with the truth, and being under the eye of the judge, who by law takes part in the proceeding, no evidence is necessary. *State v. Branch*, 115.
4. The provisions of the federal constitution relative to juries in civil cases refer only to trials in the federal courts, and not to those in the State courts. *State ex rel. Morgan v. Kennard*, 238.
5. The fourteenth amendment of the constitution of the United States does not make any change on the subject of jury trials in civil suits. *Ibid.*
6. Where the judge of the district court was of opinion that the verdict of the jury was in direct and flagrant violation of law and evidence, and in utter disregard of his charge, he should have set the verdict aside and granted a new trial, as asked for. It is impossible to sanction the practice, become too common, that an inferior judge should sign a judgment which he believes and avers to be wrong, in the hope that this court will set it aside. *Halliday v. Lanata*, 373.
7. Where counsel for appellee complained that, before this court should have set aside the verdict of the jury and remanded the case, it should have decided that their finding was erroneous: Held—That there was force in this criticism of the deeree, and that a rehearing should be granted as prayed for. *Ibid.*
- SEE NEW TRIAL, No. 1 and 2—*Adams v. Webster*, 113.
- SEE CRIMINAL LAW, No. 7—*State v. Petrie*, 326.
- SEE CRIMINAL LAW AND PRACTICE, Nos. 13, 14, 15, 16—*State v. Jean Gay*, 472. *State v. Prudhomme*, 522. *State v. Jackson*, 537. Nos. 24, 27, 29—*State v. Turner*, 573.
- SEE SHERIFF, No. 4—*State v. Burns*, 302.
- SEE EVIDENCE, No. 16.—*State v. Hardin*, 369.

**JURISDICTION.**

1. On a motion to dismiss an appeal on the ground that the matter in dispute does not exceed five hundred dollars, the amount of defendant's liabilities on a stock note as stockholder in a company will determine the jurisdiction of the court and not the percentage claimed thereon. It must be first ascertained if he is liable on the stock note itself, as alleged in the petition.

*Peychaud v. Weber*, 133.

2. When the object of a suit is to provide the means of paying the debts of a company, it is unnecessary to decide on an exception to the jurisdiction, whether the State courts can settle the affairs of an insolvent corporation.

*Ibid.*

3. Where a judgment creditor with special mortgage and vendor's privilege caused a *fi. fa.* to be issued by the district court against the property of a succession, which *fi. fa.* was enjoined by the executor of said succession, and where, whilst the injunction was pending said executor applied to the parish court for the sale of all the property of the succession, including the property involved in the injunction, for the purpose of paying the debts of the succession, and the court refused to order the sale of the property on the ground that it was in the jurisdiction of the district court for the time being, by virtue of the seizure and custody of the sheriff, pursuant to its writ: Held—That the court erred in not granting the order prayed for by the executor. Succession property can not be sold under a *fi. fa.* The executor was in possession of the property when seized, and the probate court had jurisdiction to order the sale. No injury can result to the judgment creditor by authorizing the sale prayed for by the executor if he has a mortgage superior to other creditors.

*Succession of Patrick*, 154.

4. The Second District Court of the parish of Orleans has only probate jurisdiction, and has not jurisdiction to try the suit against the heir who had been put in possession of the property of the succession.

*Martin v. Cannon*, 225.

5. Where the heirs of the deceased had accepted the succession unconditionally and the evidence showed that they were in possession of the property of the succession: Held—That the suit was improperly brought against them in the probate court; it should have been instituted in the district court; the exception to the jurisdiction is well founded.

*Succession of Widow de Gréhan*, 334.

6. The Second District Court has only probate jurisdiction. This suit against the defendants, sureties of one McPhelin, the former administrator of the succession of Lorenzo Hillerman, and now deceased, should not have been brought in the Second District

**JURISDICTION—Continued.**

Court, because said suit is not probate in its character, but is simply one to enforce an obligation contracted by defendants.

*Larue v. Vanhorn et al.*, 445.

7. The parish court has jurisdiction of suits for the recognition of heirship and for the partition of succession property, and where the amount involved exceeds five hundred dollars, the appeal is directly to this court.

*Malone v. Casey*, 466.

8. Where the character of the suit, as ascertained from the prayer of the petition, is not an action of revindication, but is simply a suit to annul a will, because the formalities prescribed by law were not observed in making it, the parish court, which admitted the will to probate, has jurisdiction of the case.

*Thibodeaux v. Voorhies*, 479.

9. The district court has no jurisdiction over this cause. It involves the examination and correction of a tutor's accounts, and, as set out, is virtually an opposition to said accounts, which are in the probate court, and of which the parish court has jurisdiction, although the amount involved exceeds five hundred dollars. Constitution 87, 88.

*Lay v. Succession of O'Neal*, 603.

10. By the allegations in the petition the tutor's annual accounts, or some of them, are homologated by the probate court, and the opposition to them must be made in the same tribunal.

*Ibid.*

11. The object of the limitation in the constitution to the jurisdiction of the Supreme Court is simply to exclude from it such controversies as are of minor importance.

*State v. Wharton et al.*, 2.

12. Where the interest of the State and of the people of the State in the correctness of the ruling of the judge *a quo* is of such magnitude as in this case, the court will not, on a bald technicality, refuse to entertain jurisdiction of the cause, even if there were no pecuniary interest shown, which, however, is not the case in this suit.

*Ibid.*

13. Article 141 R. C. C. is to be construed as applying to the defendant who is absent, or incapable of acting, at the institution of the suit, and can not be cited in the usual way, but not to one who is legally and regularly a party to a suit and who voluntarily declines making a defense or temporarily leaves the place of the jurisdiction after being cited. The jurisdiction of the court can not thus be defeated.

*Holbrook v. Bronson*, 51.

14. The jurisdiction of justices of the peace for the parish of Orleans is conferred by section 2074, page 414, Ray's Revised Statutes. It is confined to civil matters, and there is no other law conferring upon them criminal jurisdiction.

*State ex rel. Saddler v. Landry*, 60.

**JURISDICTION—Continued.**

15. Where the judge of the Second District Court, parish of Orleans, had refused to transfer a cause to the Circuit Court of the United States, because that court has not jurisdiction to try the principal, if not the only object of the suit, which was the legality and sufficiency of the evidence upon which a lost will was admitted to probate, and the revocation of said will: Held—That the United States Courts are without jurisdiction in probate matters, and that this point is too well settled to be now questioned. It is equally well settled that it was not intended to extend the jurisdiction of the United States courts over causes brought before them on removal, beyond the limits prescribed by their original jurisdiction. The subject matter of this suit is purely probate in its character, to wit: The revocation of the probate of a will, and the suit was properly brought, *under the circumstances of the case*, in the probate court which had made the order to record and execute the will.

*Fuentes v. Gaines*, 85.

16. Where parties can not attack the probate of a will in the Circuit Court of the United States, before which the petitory action against them has been brought, they should be permitted, *ex necessitate rei*, to bring the suit in the State probate court in which the order for probate was granted. Otherwise, it would be possible for a will to be fraudulently probated, and a suit to be instituted against persons in possession under titles from the heirs in the Circuit Court of the United States, without the possibility on the part of the possessors to expose the fraud. *Ibid.*
17. Where a motion as to the disqualification of a grand juror, which rested on questions of facts, was overruled, and no bill of exceptions taken: Held—That the court could not look into the correctness of the ruling, not having jurisdiction of facts in criminal causes.

*State v. Branch*, 115.

**LEASES.**

- When by the terms and conditions of a lease two lessees are bound *in solido*, a judgment from the court *a qua* against them jointly will be set aside, and if the judgment against one of the parties to the lease never had any legal force it remains in full force against the other. *Moussier and Courcelle v. Gustine and Sauvinet*, 36.
- The lessee has the right to sublease when there is no interdiction to that effect, and on such terms as may be agreed on between him and the sublessee, and where it is shown that the sublessees did not make any payment in anticipation of the terms of his contract, he is not liable to the lessor for more than he owes the principal lessee. No law is referred to by the plaintiff which requires the lease made in this instance by the principal lessee to the sublessee to be in writing. *Weatherly v. Baker*, 229.

**LIBEL AND SLANDER.**

1. The publication of any communication with or without the name of the author, which is defamatory and false, subjects the publisher as well as the author to damages in favor of the party aggrieved. *Perret v. New Orleans Times Newspaper*, 170.
2. The law looks to the animus of the publisher in permitting his columns to be used as a vehicle for the dissemination of calumny. In such a case, it is not incumbent upon the party assailed by defamation to show malice against himself on the part of the publisher, nor to prove that he has received injury by the publication. If the charges are false, the law implies malice in the publisher—not a malice which means a spite against the individual, but *malus animus*—a wanton disposition grossly negligent of the rights of others; and the injury inflicted is not repaired by the subsequent retraction or apology of the publisher, however promptly it may be made. *Ibid.*
3. The proprietor of a newspaper is not exonerated from responsibility, because the libelous matter appearing in his paper was inserted without his knowledge, or approbation, or even against his wishes. He is responsible for the acts of his agents and employes. *Ibid.*
4. It is not sufficient for his exoneration that the printer, by naming the author, gives the party aggrieved an action against him. *Ibid.*
5. A reparation by recantation can only be considered in estimating the amount of damages. *Ibid.*
6. In an action of libel it is not necessary to prove any special damage to recover. *Ibid.*
7. By the statute of 1855, Revised Statutes, p. 706, sections 3640 and 3641, the truth of libelous matter may be pleaded in justification, and if it shall appear that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted. *Ibid.*

**LAWS AND STATUTES.**

1. Where it is clearly the purpose of the Legislature to give a company time within which they would have an opportunity to accept certain conditions imposed by that body, it can not be contended that official negligence in promulgating the law, should make it impossible for such time to transpire, and thus deprive the company of the right and opportunity to accept; it would enable such official negligence to defeat the legislator's will.  
*State v. North Louisiana and Texas Railroad Company*, 65.
2. On the question in this case whether the act No. 97 of 1872, relied on by the defendants, is null and void on the ground of its being in conflict with the prohibition in article III of the constitution, because it has repealed, without containing any adequate provision

## LAWS AND STATUTES—Continued.

for the same purpose, that provision of act No. 108 of 1868, obligating the defendants to deposit in the State Treasury, at prescribed dates, the money to pay certain bonds and interest coupons issued—which obligation was secured by a second mortgage on the railroad, its fixtures, and appurtenances: Held, *First*—That the State by making the act No. 108 of 1868, the basis of its suit, recognized and affirmed its constitutionality in regard to the adequate ways and means provided for the payment of the current interest and the principal of the bonds. *Second*—That there is nothing in the record to enable the court to determine whether or not the provision made in the law of 1872 is an adequate provision for the payment of the principal and interest of the debt created by the law of 1868, and that there may be a reasonable doubt as to whether the act of the later date actually repeals that of the earlier, in the contemplation of article 111 of the constitution. *Third*—That the law creating the debt is certainly not repealed, and that the debt of the State so created being still in existence, the State is precluded, in this proceeding at least, from contesting its validity, or that of the means first provided for its payment; and that it is only the form and nature of the security required of the railroad company that has been changed. *Fourth*—That it was proper to conclude that there is such reasonable doubt with regard to the unconstitutionality relied on, as, under the well settled jurisprudence of this State and country, to justify the court in not annulling the legislative enactments referred to in this case. When there is a doubt, a law will not be held unconstitutional. *Fifth*—That this is a controversy between the State, which issued the bonds, and the railroad company for whose benefit they were issued; that the holders of the bonds and their rights are not before the court, nor any claim to enforce the payment of said bonds; that the State having paid some of the interest on them which it alleges the company were obliged to pay, and now seeking to collect back the same, the plea that the company settled with the State in accordance with act No. 97 of 1872, is a valid defense. There is nothing in the constitution inhibiting the State from accepting from its debtors such settlements as the Legislature may think judicious.

*Ibid.*

3. The act No. 6 of 1870, entitled "An Act to regulate public education in the State of Louisiana and city of New Orleans and raise a revenue for that purpose," authorizes the removal of the division superintendents upon certain contingencies, and the mere fact of plaintiff's removal is presumptive evidence that it was made for a proper cause. It was incumbent on him to show that the removal was without cause or not in conformity with existing laws.

*State ex rel. Richardson v. Graham, 73.*

**LAWS AND STATUTES—Continued.**

4. The sixth section of the act of 1868, p. 194, concerning the transfer of bills of lading and the effects of that transfer, is only a legislative sanction given to the commercial law of universal application, by which it is held that a bill of lading, legally transferred, gives title to the property it represents. It does not clash with the statute of 1855 incorporated in the 3227th article of the Civil Code.

*Delgado & Co. v. Wilbur & Co.*, 82.

5. The article 3227 does not give any privilege upon produce sold for cash. A sale for cash means that, when the property is delivered, the money is to be paid, and where not paid after delivery, so long as the property remains in the possession and under the control of the vendee, the vendor's lien remains as between the parties, but the lien does not follow it when it passes into the hands of innocent third parties. Vendors can not complain if they sell for cash and still allow purchasers to take away the goods without paying for the same. The fault being with them, the loss, if any, must be theirs also.

*Ibid.*

6. Where the property in controversy is situated in Louisiana, within whose limits the owners thereof reside, their rights can only be barred by the laws of this State, which are binding on the Federal as well as the State courts. The Federal courts do not claim to bring foreign laws into this State.

*Fuentes v. Gaines*, 86.

7. The statute of 1871, creating additional remedy for embezzlement, breach of trust or fraud, on the part of collectors of taxes, in no manner conflicts with section 1593 of the Revised Statutes of 1870, and the latter is not therefore repealed by the former.

*State v. Doherty*, 119.

8. Where it was contended that a mortgage was not recorded until after the passage of the homestead law, and that it was therefore governed by it: Held—That this is an error. The right was created before the passage of the law, and existed when it was enacted. Subsequent legislation could not destroy it. The mortgage existed independent of its registry. Registry is intended to protect third parties, not parties to the contract.

*Mills v. Sheriff of East Feliciana et al.*, 142.

9. Where defendants received a certain quantity of cotton, sold it, and collected the proceeds of the sale as commission merchants or factors of the plaintiff: Held—That the debt resulting from it is a fiduciary one, and exempted by the insolvent law from its operation. The money was received in trust for the plaintiff. Defendants, by converting it to their own use, rendered themselves amenable to the criminal laws of the State. It can not, therefore, be inferred that the insolvent laws of the State intended to discharge a debtor from such a debt, even if it had not been therein expressly excepted.

*Tate v. Laforest*, 187.

**LAWS AND STATUTES—Continued.**

10. By the laws of Louisiana native born free persons of color were in the full enjoyment of the so-called private rights in 1844. *Walsh v. Lallande*, 188.
11. The object of section forty of the revenue law of 1871 is to give the taxpayer notice, that he may have an opportunity to have errors corrected and a just assessment made. Where it is proved that he had such notice, he has no cause to complain. *Gay v. Hebert*, 196.
12. The homestead law, exempting certain property from seizure on a judgment enforcing a mere ordinary debt, is not unconstitutional. The rights of the creditor, and not his security, unless the security forms part of his contract, must be invaded before he can invoke the constitutional privilege on which he relies. The law in this case does not affect his vested rights, but only impairs his security for the payment of his claim. *Robert v. Coco*, 199.
13. Construing the statute of twenty-eighth February, 1870, in connection with section 3990 of the Revised Statutes, the sense resulting from both is, that section 3990 of the Revised Statutes does not include within its general sweep the acts of the General Assembly during the session of 1870. On the contrary, the acts and joint resolutions of the General Assembly passed during the session of 1870 should take precedence of the act adopting the Revised Statutes, and be held as repealing in whole or in part any of those revised statutes that might be found to be in opposition or in conflict with the enactments or joint resolutions of the session of 1870. *Succession of Winn*, 216.
14. The State law of January 13, 1873, merely provides a more speedy remedy for the settlement of contests for judicial offices. It is not violative of section 1 of article 14 of the constitution of the United States. Should it even be admitted that the law authorizes the suit in the name alone of the party claiming an office, the fact that the State has joined with him in his demand, advocated by private counsel, does not invalidate the proceedings. *Utile per inutile non vitiatur*. *State ex rel. Morgan v. Kennard*, 238.
15. The provisions of the act of the Legislature, No. 39, 1873, for transferring cases are not repugnant to articles 3, 90 and 114 of the State constitution. *Kemp v. Ellis*, 253.
16. With the character of laws as being odious, or entitled to favor, courts have not to deal. *Collin v. Knoblock*, 263.
17. It is only under the statutory provision of 1855 that courts can proceed, in relation to parish offices, and through the agency of juries, to supervise the counting of votes, correct calculations, purge the polls of illegal votes, ascertain and establish majorities. It is confined to cases where no commissions have issued. *Ibid.*

**LAWS AND STATUTES—Continued.**

18. The subject matter of proceedings under the intrusion act is widely different from that of the statute of 1855. In cases under the intrusion law, courts can not go beyond commissions legally issued. *Ibid.*

19. Rights may be acquired under a law, notwithstanding that law may have been subsequently declared to have been unconstitutional. To escape the penalties inflicted by a law, or avoid responsibilities imposed by it, upon the ground that it is unconstitutional, its unconstitutionality must be distinctly declared before the penalty or responsibility has accrued.

*Factors and Traders' Insurance Co. v. City of New Orleans*, 454.

20. In the laws of the United States or proclamations of the President prohibiting, during the late war, any intercourse and trade between persons residing within the Federal and Confederate lines, there is nothing which could prevent a French citizen from acknowledging a debt and agreeing to pay it, and mortgaging his property to secure its payment. *Banker v. Durand*, 511.

21. When a law is susceptible of two constructions, the one which will give effect to the law, rather than the one which would render the law unconstitutional, must be adopted.

*City of New Orleans v. Salamander Insurance Company*, 650.

SEE CONSTITUTION AND CONSTITUTIONAL LAW, Nos. 11 to 18—

*Whited v. Lewis*, 568.

SEE OFFICE AND OFFICERS.

**MINORS.**

1. There is no difficulty in the objection that the plaintiff can not enforce this claim, because of the informalities of the transfer thereof by the natural tutor. This is a question that concerns the minors. The formalities for the alienation of their property being alone for their benefit, they alone can urge the omission thereof. But, at the time of the transfer in this case, the heirs were of age, and they received the money paid by the transferree.

*Seyburn v. Deyris*, 483.

SEE TUTORS AND TUTORSHIP.

**MANDAMUS.**

1. The Recorder of Mortgages is not mentioned in section 52 of act 42 of 1871, and this court can not supply the omission, if it be an omission. If the relator has registered mortgages in favor of the State and the State has not paid him therefor, and his compensation is not otherwise provided for by law, and his legal demands have not been complied with, he may have his recourse against the State, but his remedy is not by mandamus against the Auditor.

*State ex rel. Recorder of Mortgages v. Clinton*, 285.

**MANDAMUS—Continued.**

2. Where the Board of Selectmen of a city have the right to be the judges of their own election and of that of their officers, it is not merely a ministerial duty which they have to perform, it involves discretion and a mandamus can not be used to enforce the performance of a discretionary duty.  
*State ex rel. Shorten v. Board of Selectmen of the city of Baton Rouge*, 310.
3. Where the relator sought by mandamus to compel the Selectmen of the city of Baton Rouge to issue to him a certificate of election and to recognize him as mayor of that city, on the ground that the election commissioners had decided he was elected, and that the Selectmen can not determine that he was not elected, because no one but a judge can decide the question: Held—That the Board of Selectmen can, under the eighth section of the city charter, exercise their discretion so far as to determine the relator's right to the certificate, and that the use of this discretion is not the exercise of judicial powers in the sense of the constitution, and therefore not repugnant to the article ninety-four of that instrument. The action of the Board of Selectmen is not conclusive of the rights of the relator. He can sue for the office, but he can not proceed by mandamus. *Ibid.*
4. To authorize a writ of mandamus, there must appear a specific ministerial duty which the applicant has a direct right or interest in having enforced. *Mossy v. Harris*, 623.
5. Where the pleadings indicate that the application is simply to obtain a judicial order in favor generally of holders of a certain class of warrants, and not to secure a specific right to a particular party, it is not a serious contest, and not a case for a mandamus. *Ibid.*

SEE STOCKHOLDERS AND STOCKS, No. 4—*State ex rel. Philips v. New Orleans Gas Light Company*, 413.

**MARRIAGE.**

1. A married woman can not be sued on the ground that, being shown to be the keeper of a boarding house and therefore a public merchant, no authorization is necessary either from her husband or the court. *Moussier & Courcelle v. Gustine & Sauvinet*, 36.
2. Articles 121 and 131 of the Civil Code can not be construed to warrant the conclusion that the carrying on of any other business by a married woman than that of merchandise constitutes her a public merchant. *Ibid.*
3. The words "separate trade" in the latter clause of article 131 of the Civil Code, declaring that the wife "is considered as a public merchant if she carries on a separate trade, but not if she retails only the merchandise belonging to the commerce carried on by her husband," refer clearly to the trade in merchandise and not to any other business or pursuit. *Ibid.*

**MARRIAGE—Continued.**

4. Where citation is served personally on a married woman authorized to defend the suit, she is regularly in court, and on its being shown that she has a domicile in the parish, a notice to which she is entitled can be served on her personally, or at her said domicile, unless there is some special provision of law requiring another mode of giving the notice. *Holbrook v. Bronson*, 51.
5. Where the husband has not appeared with his wife, in the suit instituted by her, the latter must show his authorization. Her own averments, or those of her counsel as to that fact are not sufficient. *Sommers v. Schmidt*, 93.
6. Where the husband joins the wife in her petition, this is sufficient authorization to her to sue. *Succession of Payne*, 202.
7. Where a fair and correct settlement was made between A. Verret and his sons-in-law, W. H. and J. M. Knight, in which the mortgage judgments in favor of their wives against Verret were placed to their credit and reduced their own indebtedness *pro tanto*, and subsequently W. H. and J. M. Knight transferred said judgments to Adams & Co., and their wives ratified the transfer: Held—That Adams & Co., obtained no mortgage under said transfer, because the judgments thus transferred had been extinguished by the settlement between W. H. Knight, J. M. Knight and A. Verret, which was a valid one. The husbands could have sold those judgments or collected the amount of the judgments and used the money in payment of their debts, or in any other way they had chosen. *Miltenberger v. Keys*, 287.
8. The power of the husband to administer the wife's property is different from that of an ordinary attorney. One essential difference is, that the husband may lawfully appropriate to his own use the money of his wife, collected by him. The attorney can not. *Ibid.*
9. Where there is community between husband and wife, the husband is the head of it, and is responsible for the debts of the community. The death of his wife does not deprive him of the right to make *bona fide* settlements for the payments of the debts of the community, nor do such settlements novate the debts as to the community. The community property is liable for the community debts. *Rusk v. Warren et al.*, 314.
10. Where a suit was brought against a wife after her husband's death, on a promissory note made by said wife and her husband *in solido*, and secured by a mortgage on property standing in the name of the wife, but purchased during the existence of the community: Held—That she could not bind herself with her husband by borrowing money to pay for said community property. *Millaudon v. Widow Carson*, 380.

**MARRIAGE—Continued.**

11. Parties to a marriage contract in Louisiana can agree therein, that the property they may acquire by succession or donation during marriage shall fall into the community of acquests and gains, and the father and mother of the parties to the marriage can give, for the benefit of said parties, the whole or a part of the property they may have on the day of their decease.  
*Desobry v. Schlater et al.*, 425.
12. Parties may stipulate as they like, provided the thing stipulated is not in contravention of a prohibitory law. Any stipulation, therefore, in a marriage contract, which is not in violation of a prohibitory law, is binding upon the contracting parties as long as the contract lasts.  
*Ibid.*
13. All stipulations which the law permits to be made in marriage contracts may be altered by the husband and wife jointly before the celebration of the marriage, but not afterwards. As they bind themselves at the time of the marriage, so they remain bound so long as the marriage lasts.  
*Ibid.*
14. Whether the stipulations of a marriage contract can be subsequently changed or not, it is clear that the changing of said contract would be, in reality, a new one, and that, as such, it would have to be entered into by all those who were parties to the first contract, and that the stipulations to that effect should be positively stated.  
*Ibid.*
15. The fruits of community property belong to the community and are liable to seizure in payment of a community debt.  
*Ibid.*
16. Emancipation gave to the slave his civil rights, and a contract of marriage, legal and valid by the consent of the master and moral assent of the slave, although dormant during the slavery of the parties, produced, from the moment of their freedom, all the effects which result from such contract among free persons.  
*Pierre v. Fontenette et al.*, 617.
17. But the marriage which was to produce these civil results must have existed at the time the emancipation took place. If the marriage was dissolved before emancipation, the parties' rights were no longer dormant; they were dead; and the subsequent emancipation, as it could not resuscitate the marriage, could produce none of the civil fruits which are the results of a civil marriage.

SEE COMMUNITY.  
*Ibid.*

**MORTGAGES.**

1. The object of registry both of sales and mortgages is notice, and when the recorder registers a private sale, whether he has done so on sufficient proof is immaterial as regards notice to the public; the object of the law is fulfilled, and subsequent purchasers are affected.  
*Pierce v. Clark and sheriff*, 111.

## MORTGAGES—Continued.

2. The failure of the recorder to inscribe with the instrument the proof upon which he admits it to registry does not render the registry null. *Ibid.*
3. A judicial mortgage, like any other, must be reinscribed within ten years from the first inscription in order to preserve the rank acquired by said inscription. *Carroll et al. v. Seip et al.*, 141.
4. Where it was contended that a mortgage was not recorded until after the passage of the homestead law, and that it was therefore governed by it: Held—That this is an error. The right was created before the passage of the law, and existed when it was enacted. Subsequent legislation could not destroy it. The mortgage existed independent of its registry. Registry is intended to protect third parties, not parties to the contract.

*Mills v. Sheriff of East Feliciana*, 142.

5. The mere recital of an act of mortgage in a subsequent act acknowledging the obligations contained in the first act, does not, as to third parties at least, operate the re-inscription of the first act. The subsequent acknowledgment may be sufficient to interrupt prescription as to the debt, but does not re-inscribe the mortgage which secured it. Where the plaintiff's mortgage was in existence at the time of the sheriff's sale, and the mortgaged property was adjudicated to him, he had the right to retain the purchase money up to the amount of his debt, and the title to the property should have been made to him.

*Blair & Co. v. Taylor et al.*, 144.

6. The vendee evicted of the property by the foreclosure of a prior mortgage containing the pact *de non alienando* is not bound to defend the executory proceedings or to give notice thereof to the vendor. The undertaking of the purchaser is to pay the price; that of the vendor is to maintain the title and the possession.

*Ball et al. v. Estate of Sharpley Owen*, 195.

7. The second mortgage creditor has no action against the prior mortgage creditor for the balance remaining in the sheriff's hands or the hands of the purchaser, and the plaintiff, who gets his judgment paid has no right to object to the payment of the second mortgage. *City of Baltimore v. Parlange*, 335.
8. Where the evidence shows that A owed the Merchants' Mutual Insurance Company ten thousand dollars; that he executed in favor of said company a mortgage of fifteen thousand dollars to secure the payment of two promissory notes, one for \$10,000 and the other for \$5000, to the order of the maker and indorsed in blank; that he tried to have the company to discount these notes and pay itself out of the proceeds; that the company took the ten

**MORTGAGES—Continued.**

thousand dollar note, but returned the five thousand dollar note to the maker; and that B became the owner of it in good faith and for a valuable consideration: Held—That on the Merchants' Mutual Insurance Company foreclosing the mortgage for the ten thousand dollar note and becoming the purchaser of the property at sheriff's sale, it had no right to curtail that mortgage to its advantage; that there was no extinguishment thereof by confusion, and that B had a right to one-third of the net proceeds of the sale.

*Mechanics Mutual Insurance Company v. Jamison*, 363.

9. No sale or partition of mortgaged premises can defeat the mortgage previously existing thereon. The purchase of the property by Packard et als., the stipulations and arguments between them and the mortgageor, and the partition of the property among themselves, could not affect the rights of Lee, the holder of the mortgage notes. The defendants, Packard et als., in partitioning the property among themselves and making partial payments, could not limit the operation of the mortgage upon the whole, because the mortgage was an indivisible obligation.

*Lee v. Packard et al.*, 397.

10. There is no force in the objection that the mortgage perempted for want of reinscription within ten years. Neither inscription, nor reinscription, is necessary, so far as the parties to the mortgage or their heirs are concerned. *Seyburn v. Deyris*, 483.
11. The property mortgaged was community, and no distribution thereof among the heirs and surviving widow (whose rights are only residuary) can defeat the mortgage given by the deceased to secure a community debt. *Ibid.*
12. Where Harwell sold to Mathews a plantation and slaves, who executed certain mortgage notes in favor of said Harwell or order, and subsequently mortgaged said property to Hall, Rodd & Putnam, to secure a debt due them, and then retransferred the property to Harwell, his vendor, who, as a part of the consideration of the retrocession to him, assumed to pay the notes executed by Mathews for the price of the first sale and transferred to third parties by Harwell—two of which notes were redeemed by said Harwell and transferred to Perret, these two notes were extinguished on their return to the possession of Harwell, after he had assumed their payment in the contract with Mathews, by which he repurchased the plantation for which the notes had been given. If conceded that Harwell could reissue the notes, he could not have revived the mortgage by this reissuing. Mortgages are not subject to the rules of the commercial law by which the rights and obligations of parties to commercial paper are fixed.

*Hall et al. v. Chaceré et al.*, 493.

**MORTGAGES—Continued.**

13. The intervenor was the holder of notes secured by a mortgage importing a confession of judgment and containing the pact *de non alienando*, which authorized him to pursue the mortgaged property in the hands of the third possessor, and the latter, when he enjoined him in so doing, assumed the burden of showing that the sale at which he acquired the mortgaged property divested the rights of the mortgagee thereon. *Dupre v. Thompson*, 503.
14. The allegation that Parks never owned the land in question, and therefore that the mortgage never took effect upon it, works fatally against the defendant, who raised this objection. If Parks, the author of defendant's title, never owned the land, it follows that defendant does not own it and can not be injured by this suit. Repudiating the title of Parks, he repudiates his own, and puts himself out of court. *Pipes v. Nosworthy*, 557.
15. It has never been held that, to make a valid inscription of a conventional mortgage, an entire copy of the authentic act in which it is granted should be spread upon the public record. The object of registration is public notice, with reasonable certainty, of the substantial particulars of the mortgage; and when this is done the purpose of the law is satisfied. *Poutz v. Reggio et al.*, 637.
16. The re-inscription on the fourth of December, 1869, of a mortgage given in 1844, reinstated the inscription thereof, to take effect from the date of its inscription; and as this re-inscription took place anterior to the plaintiff's judgment, it follows that when the mortgaged property was sold under that judgment, it was first subject to the payment of the mortgage debt. *Ibid.*
17. Where the suit is brought on a mortgage note against the drawers thereof and the indorser who transferred it to plaintiff, and to enforce the plaintiff's hypothecary action against the property mortgaged, which is in the hands of third persons, the defendants in this case, and it appears that, before the act of mortgage was recorded in the mortgage records of the parish, the purchaser against whom the mortgage existed, exchanged the property for another with D, who was a witness to the original act of sale, and whom defendants have called in warranty: Held—That D being a witness to the act of mortgage was not a third person in the sense in which the terms are used in articles 3342, 3343, C. C. Besides, it appears that the mortgage was recorded long before the property was acquired by defendants.

*McDaniel v. Stoval*, 495.

**SEE REGISTRY.**

**SEE BILLS AND PROMISSORY NOTES, No. 10—*Hoyle v. Casabat*, 438.**

**SEE PRESCRIPTION, No. 16—*Seyburn v. Deyris*, 483.**

**SEE COMMUNITY, No. 3—*Lemoine v. Powers*, 514.**

**SEE TUTOR, No. 14—*Neilson v. Neilson*, 528.**

**NEW TRIAL.**

1. A motion for a new trial can not be refused "with a view of allowing the Supreme Court to pass upon the rights of the parties, under the conviction that it is more than useless to put the parties to additional and unnecessary expense by submitting the case to another jury which would be composed as the one which tried the case under existing laws." This mode of proceeding and such strictures made in advance on the jury to which it might be submitted, can not be sanctioned. *Adams v. Webster*, 113.
2. Where the judge in a lower court is satisfied that the verdict of a jury is wrong, it is his duty to grant a new trial and not indirectly deprive the party of a trial by jury, by rendering what he believes to be an improper and unjust judgment with the view of having it revised on appeal. It might be that the verdict, on a second trial, would prove satisfactory to both parties. *Ibid.*
3. This court is not authorized to refer to the reasoning of the judge *a quo* for the facts. Errors of law in a motion for a new trial can be reviewed here, but not the facts. *State v. Socha*, 417.

SEE JURIES AND JURORS, No. 6—*Halliday v. Lanata*, 373.

**NEGLIGENCE.**

SEE DAMAGES, No. 4—*Avegno v. Hart*, 235.

SEE DEPOSIT, Nos. 7, 8—*Levy v. Pike*, 630.

**NEW ORLEANS.**

1. An ordinance of the City Council of New Orleans can not be questioned with regard to its being in contravention of an article of the constitution. The question with reference to the validity of its ordinances is to be tested by the sanction which it has from the Legislature to perform such acts, and in such cases the point to be determined is not whether any particular ordinance is contrary to the constitution, but whether it is permitted by an act of the Legislature. The question would then arise whether the law of the Legislature under which the Council acted was constitutional or not.

*City of New Orleans v. Crescent Mutual Insurance Company*, 390.

2. The city of New Orleans is not bound to indemnify its citizens for any loss by fire occasioned by the negligence of the fire department. It can not be looked upon as an insurer against such losses. There is no contract, express or implied, between the citizens and the city of New Orleans to indemnify them for any loss which may occur to them by reason of the burning down of their houses, except in cases specially provided by law. The Firemen's Charitable Association has always been a voluntary one, its members are not paid, and the \$126,000 per annum, allowed to them out of the city treasury, are only a subsidy, to enable the association to carry out its objects. *Yule v. city of New Orleans*, 394.

**OBLIGATIONS.**

1. A party for whom a building is erected is not responsible for materials furnished to the contractor, if said party has not been notified of any claim against the contractor before payment according to the contract, and a detailed bill recorded according to law. *State ex rel. Deblieux v. Recorder of Mortgages*, 61.

2. Where the liability for interest coupons results solely from, and is embraced in, the liability for the bonds of which they were a part when issued, a release for the bonds includes the liability for the coupons.

*State v. North Louisiana and Texas Railroad Company*, 65.

3. It is no defense to a suit to plead that the plaintiff had said to the defendant that he would discontinue his suit if some other creditor would do the same. Such a promise would neither discharge the debt nor bar the action, because an agreement without consideration is not obligatory.

*Broadbush et al. v. Nolley et al.*, 184.

4. The vendee evicted of the property by the foreclosure of a prior mortgage containing the pact *de non alienando* is not bound to defend the executory proceeding or to give notice thereof to the vendor. The undertaking of the purchaser is to pay the price; that of the vendor is to maintain the title and the possession.

*Ball et al. v. Estate of Owen*, 195.

5. A release in a case of provisional seizure can not be considered as an ordinary conventional obligation to which may be applied the principle that: As one binds himself, so shall he be bound. It is no valid commutative contract between the plaintiff and the surety, defendant on the bond. As a public officer, the sheriff has not the authority, nor is it his duty, to make a contract of this character in which there can exist no reciprocal obligation.

*Urquhart v. Carrin*, 218.

6. Where the occasion of the discharge of the plaintiff was a quarrel between said plaintiff and defendant commenced by defendant, during which insulting expressions were used by both: Held—That, as the employer was in fault, he should not be permitted to discharge his employe without paying him for the whole term for which he was employed.

*Leche v. Claverie*, 308.

7. There is no reason why the purchasers of property should not legally bind themselves *in solido* for the payment of the price; if the act of sale does not stipulate solidarity, and the notes do, this is sufficient. Parties may bind themselves as they see fit, and, as they bind themselves, so must they be held.

*Gantt v. Eaton et al.*, 507.

8. Where Elder, one of the defendants, had been cited as a member of the commercial firm of Walters & Elder, in a suit on certain

**OBLIGATIONS—Continued.**

drafts, and it was alleged and proved, in defense, that said drafts had been given out of the usual course of the partnership business, without any authority, and not on account of the partnership, but where it was also proved that Elder had signed the drafts: Held—That he can not deny *his* authority to make the drafts, and that he is personally responsible for the amount thereof. The firm was sued, but evidence was received without objection which established his personal liability. He is bound by this proof.

*Louisiana Mutual Insurance Company v. Walters et al.*, 560.

9. The objection that there was no notice of dishonor is not valid. The drawer had no funds in the hands of the drawee, and long after the drafts were due, and with the knowledge that they had not been protested, he frequently acknowledged his liability thereon and promised to pay them. *Ibid.*
10. There is no force in the position that Elder gave the drafts for a balance on the compromise of a debt due by the estate of one Pomroy. As the representative of the estate, he could not bind it by drawing drafts, but he bound himself. *Ibid.*
11. Where promissory notes, prescribed on their face, represented the legal obligations of the defendant's father for borrowed money, and the defendant gave his own notes therefor, it was not a *nudum pactum*; there was a valid consideration. The son had the right, by natural mandate, to pay his father's debt, or to promise to pay it, and bind himself unconditionally, as he did. Let him be bound as he saw fit to bind himself. *Matthews v. Williams*, 585.

SEE APPEAL, Nos. 45, 46—*State ex rel. Lacroix v. Judge Fifth District Court, parish of Orleans*, 664.

**OFFICE AND OFFICER.**

1. Where it was contended that a membership of the board of returning officers was not an office within the contemplation of the law, and therefore that the suit should not be brought under the intrusion act: Held—That the members of the board are designated as officers in the act itself creating it, and that they come within the legal definition of the word. *State v. Wharton et al.*, 2.
2. Where two sets of officers claim to be the legal board of returning officers, it is difficult to conceive why this is not a judicial question. The Governor is not vested with the extraordinary discretion to determine who are the returning officers under the law. *Ibid.*
3. The extrusion and exclusion of Bovee, the Secretary of State *de jure*, from the office by the Governor, did not and could not vest in said Governor the control of the office with the right to put in and put out the occupants thereof at his pleasure. There was no vacancy in the office of Secretary of State—Bovee, the incumbent

**OFFICE AND OFFICER—Continued.**

- de jure*, who was only excluded or suspended, and whose office was in the meanwhile filled by Herron, the Secretary of State *de facto*; and yet Wharton was appointed Secretary of State without reference to any removal or vacancy. The commission is without effect. *Ibid.*
4. Wharton, not being legally commissioned Secretary of State, could not as such be *ex officio* a member of the returning board. There is no evidence that he was elected member of the board, and it is not satisfactorily shown that he did take the required oath as a member. *Ibid.*
5. Hatch and Da Ponte were not legally elected members of the returning board. The law provides that "in case of any vacancy by death, resignation or otherwise by either of the board, then the vacancy shall be filled by the residue of the board of returning officers." Warmoth, Lynch and Herron were the residue, of whom two, Lynch and Herron, voted for Longstreet and Hawkins, and Warmoth voted for Hatch and Da Ponte. *Ibid.*
6. Where a suit is by a stockholder of a company to compel the officers to permit him to examine the books of the company, and there is no amount in dispute which could give the court jurisdiction, the appeal will be dismissed.
- State ex rel. Newgass v. Friedlander, President, 43.*
7. The grant of power to the Executive to remove an officer for a certain cause implies authority to judge of the existence of that cause. The power vested exclusively in executive discretion can not be controlled in its exercise by any other branch of the government.  
*State v. Doherty, 119.*
8. The statute of 1871, creating additional remedy for embezzlement, breach of trust or fraud, on the part of collectors of taxes, in no manner conflicts with section 1593 of the Revised Statutes of 1870, and the latter is not therefore repealed by the former. *Ibid.*
9. The fifty-fourth section of the act of 1870, No. 100, relating to elections, repeals section 1430 of the Revised Statutes, being section No. 53 of the act of March 15, 1855, prescribing the mode of contesting elections, and the party commissioned under the provisions of said act of 1870 is *prima facie* entitled to the office he claims. *Hughes v. Pipkin, 127.*
10. Police juries are not prohibited from appointing a district attorney *pro tempore* after the lapse of the thirty days mentioned in the statute creating that office. But in that event, the statute confers the same power on the parish judges, and the party that first exercises the power exhausts it. The purpose of the law is to guard against the probability of a vacancy.
- State ex rel Gorham v. Montgomery, 138.*

**OFFICE AND OFFICER—Continued.**

11. A police jury is not a legislative body, and its members are not legislators who become *functi officio* with the expiration of the terms for which they are elected or appointed, but can lawfully administer the powers confided to them till their successors are elected and qualified. Revised Statutes of 1870, sec. 2608. *Ibid.*
12. The term of office of the District Attorney is four years, and the District Attorney *pro tem.* holds office for the same period. Revised Statutes of 1870, section 1178. *Ibid.*
13. A police juryman is not an officer in the intendment of that clause of the constitution prohibiting a person from holding more than one office, except that of justice of the peace. That clause of the constitution applies only to constitutional offices, and does not prevent a constitutional officer from holding a municipal office. *Ibid.*
14. Where the Auditor had no authority to draw the warrants he issued, the fact of his drawing them would create no debt against the State, and if issued with the intention of defrauding the State, the Treasurer is not bound to pay them, simply because they may happen to be in the hands of an innocent holder.  
*State ex rel. Strauss v. Dubuclet*, 161.
15. Something more than the genuineness of the Auditor's signature and the lawfulness of the issue is required to protect the holder of State warrants, innocent though he may be. Not being commercial paper, they can be transferred only by the indorsement of the parties in whose favor they were issued. The genuineness of that indorsement must be proved. *Ibid.*
16. The State law of January 13, 1873, merely provides a more speedy remedy for the settlement of contests for judicial offices. It is not violative of section 1 of article 14 of the Constitution of the United States. *State ex rel. Morgan v. Kennard*, 238.
17. Should it even be admitted that the law authorizes the suit in the name alone of the party claiming an office, the fact that the State has joined with him in his demand, advocated by private counsel, does not invalidate the proceedings. *Utile per inutile non vitiatur.*  
*Ibid.*
18. The Warmoth commissions that were issued before the general election returns were reported and promulgated by the returning officers of the State, are null and void. *Kemp v. Ellis*, 253.
19. The court will take judicial cognizance of that irregularity which renders the issuing of a commission null and void, as having been done in contravention of positive law. *Ibid.*
20. A commission issued by the Governor must be recognized as having legal force, when it bears *prima facie* evidence of genuineness and validity, and nothing to the contrary is shown. *Ibid.*

**OFFICE AND OFFICER—Continued.**

21. Under the intrusion into office act, it does not appear that authority was conferred upon the courts to go beyond an investigation of the titles set up by the contestants for the office in controversy. *Collin v. Knoblock*, 263.
22. A review of all the cases adjudicated by this court under the intrusion act will show, that, in every instance, not one will be found which depended for its solution upon the inquiry as to which of the contestants obtained the larger number of votes. *Ibid.*
23. The adjustment and compilation of election returns, determining the number of legal and illegal votes cast for each candidate, declaring the result of an election and furnishing the successful candidate with the proper certificate, in short superintending and controlling all the details of an election, belong properly to the political department of the government. *Ibid.*
24. It is only under the statutory provision of 1855, that courts can proceed, in relation to parish offices, and through the agency of juries, to supervise the counting of votes, correct calculations, purge the polls of illegal votes, ascertain and establish majorities. It is confined to cases where no commissions have issued. *Ibid.*
25. The subject matter of proceedings under the intrusion act is widely different from that of the statute of 1855. In cases under the intrusion law, courts can not go beyond commissions legally issued. *Ibid.*
26. No authority is delegated to the judiciary under the intrusion act, to discuss, modify or abolish the official returns of the regular State returning officers. Such a right can not be assumed as an implied power. *Ibid.*
27. This court will take judicial cognizance of the fact that on the fourth day of December, 1872, the date of the Warmoth commission to Knoblock, the official returns of the election had not been promulgated, and therefore that the issuing of the commission was a nullity. *Ibid.*
28. The defendant having been returned by the legal returning board of the State as elected judge of the Fourth District Court of New Orleans, and upon that return the Acting Governor having issued a commission to him according to law, it can not be said that one holding an office under such a commission has intruded into, or unlawfully holds the office. *State ex rel. Bonner v. Lynch*, 267.
29. No statute conferring upon the courts the power to try cases of contested elections or title to office, authorizes them to revise the action of the returning board. *Ibid.*
30. The only power the courts have under the intrusion into office law is to decide if one or neither of the contestants has a legal title to the office, and the commission of each is the evidence of that fact. *Ibid.*

**OFFICE AND OFFICER—Continued.**

31. Where the State Assessors have delivered to the Auditor the assessment roll and received in full their compensation for their services, the contract between them and the State for making the assessment is completely executed. The obligation of the State to pay them is discharged, and it can not afterwards be revived by any use the Auditor might make of said roll.

*State ex rel. Board of Assessors v. Graham*, 309.

32. Where, on the fourth of April, 1870, Campbell was elected by the Council of the city of New Orleans, recorder of the Sixth District, the term of his appointment being for two years, and expiring, therefore, on the fourth of April, 1872, and where Michel was appointed in his place, by the Governor, on the twentieth of September, 1872, and on the twenty-fourth of September, 1872, the Council again elected Campbell: Held—That, in a legal sense, the office was vacant on the fourth of April, 1872, and Campbell was only a tenant thereof at the will of the appointing power, and that, under the circumstances of the case, the appointing power was vested in the Governor, by the 1577th section of the R. S., and not in the Council of the city of New Orleans. The appointment being made by the Governor, there was no vacancy, and the subsequent election by the Council of another person, was the filling of a place which was not empty.

*State ex rel. Michel v. Campbell*, 340.

33. This is a controversy for the office of sheriff of the parish of Pointe Coupee. The suit is brought in plaintiff's own name. He mistook his remedy. The proceeding should have been under the "Intrusion Act." It was not authorized by act No. 41, of the acts of 1873.

*Breux v. Lejenne*, 364.

34. This court does not recognize the right of the Attorney General, whose term of office is about expiring, to make an agreement so as to preclude his successor from taking an appeal and otherwise discharging his duty to the State.

*State ex rel. Nixon v. Graham*, 433.

35. An Attorney General who palpably neglects his duty, and who abandons the interest of the State which he was charged to protect and to defend, has no authority to make contracts binding on his successor for a like dereliction of duty.

*Ibid.*

36. The Attorney General is not the State, but only its counsel. His agreement to acquiesce in a judgment is not the acquiescence of the State, nor does it bind a succeeding Attorney General not to take an appeal where the time for appealing has not elapsed.

*Ibid.*

37. There can not be, at the same time and in the same State, two valid State governments, with two sets of officers.

*State v. McFarland*, 547.

**OFFICE AND OFFICER—Continued.**

38. Where certain persons, to wit: Morrison and Pickens, pretended, the one as clerk and the other as sheriff of the parish of Caddo, to hold their offices and to exercise the functions thereof under what they called the "McEnery government," in opposition to the authority of the United States and the laws and decisions of the courts of this State: Held—That it would seem to be absurd to require an argument to show that parties occupying such positions can not be regarded as *de facto* officers of the government whose authority they contemn. *Ibid.*
39. No. 41 of the acts of the Legislature, session of 1873, forbids persons occupying the position therein described from performing any official act, and also prohibits all officers of the State from recognizing them or giving effect to their acts. "Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed." C. C. art. 12. *Ibid.*
40. Every official act of Morrison and Pickens is, therefore, null and void, if they be in the category of persons declared to be usurpers in the first section of act No. 41 of 1873, and there is no doubt that they are in said category. *Ibid.*
41. They do not hold office by virtue of any title. They never were declared elected by the Board of Returning Officers at the general election of November, 1872, neither have they been legally commissioned. The documents called commissions, which they hold, purporting to have been issued on the fourth of December, 1872, are absolute nullities, having been issued in violation of law. *Ibid.*
42. No one claiming an office by election in November, 1872, could have been commissioned except by acting Governor Pinchback or by Governor Kellogg, inasmuch as Governor Warmoth was suspended by being impeached by the House of Representatives before the promulgation of the returns of the election by the Returning Board, and his trial was discontinued in consequence only of the expiration of his term of office. *Ibid.*
43. No one shall exercise the functions of an elective office by virtue of an election unless he has been declared elected according to existing laws; and in cases where the law requires the officers to be commissioned, until such commissions shall have been issued. Neither of these prerequisites was observed in this case. *Ibid.*
44. The acts of Morrison and Pickens in assuming to act as the sheriff and clerk of Caddo after the promulgation of the law aforesaid, were in flagrant violation and contravention of its statutory provisions. Such acts are crimes, and consequently can have no legal effect. Those who themselves have violated the law by recognizing such pretended officers, must suffer the consequences of their disobedience. *Ibid.*

**OFFICE AND OFFICER—Continued.**

45. The pretended official acts of Morrison and Pickens are nullities, and therefore the bond which is the basis of this suit, as well as the proceedings had in the case while Morrison and Pickens were pretending to act as clerk and sheriff, are null and void. *Ibid.*

SEE LAWS AND STATUTES, No. 21—*Banker v. Durand*, 511.

SEE LAWS, No. 3—*State ex rel. Richardson v. Graham*, 73.

SEE GOVERNOR, No. 12—*State ex rel. Dayries v. Yoist*, 396.

**PLEADINGS.**

1. Where judgment *in solido* being rendered against Wallace & Choppin with vendor's privilege on a certain lot of machinery sequestered in the hands of said firm, but released on bond, and after release sold to Choppin & White, successors to the former, an appeal was granted to Wallace & Choppin and no bond was given by said firm, but by Choppin alone for a suspensive appeal; and pending the appeal, the parties who had obtained judgment against Wallace & Choppin issued execution and seized the property released on bond as aforesaid, which execution was enjoined by Choppin & White: Held—That in answer to the injunction suit, no averment or proof of simulation having been made, the party in possession under a title could not be proceeded against in this indirect manner. *Choppin & White v. Blanc & Legendre*, 35.
2. In this case the defendant resisted the payment of articles of furniture which she admitted to have bought, on the ground that they had been sold, delivered and put up by plaintiffs' father, under whom they claimed, for the express purpose of enabling her to fit up and keep a house of prostitution, which transaction she alleged to be reprobated by law, contrary to good morals and therefore of a nature not to be enforced by the court: Held—That the defendant could not be permitted to avoid the payment of a debt by pleading her own infamy, for reasons assigned in a similar case lately decided—*Hubbard v. Moore*, 24 An. p. 591.  
*Sampson Brothers v. Kate Townsend*, 78.
3. Where A as assignee of B sued C on an open account, and C alleged in answer that he had deposited with B a large sum of money before the transfer to A, which had not been accounted for, and pleaded compensation: Held—That C, under the pleadings, did not owe B the amount set out in the account sued on; that he could transfer to A only such rights as he possessed; that compensation took place, and that C should have the opportunity to show it.  
*Adams v. Webster*, 117.
4. Under sections 2595, 2605, R. S., relative to contested elections and the whole tenor of the intrusion law, defendant in the court below, and relator here on application for a mandamus, could waive the delay for answering and have a day designated for trial

**PLEADINGS—Continued.**

without waiting until issue was joined by said answer. Whether the nature of the defense developed in the answer when filed would have authorized a continuance on behalf of the plaintiff is not a question in this case. If the plaintiff is debarred from asking for a jury to be summoned and for a continuance to that effect, it is by his own fault. There was no legal and valid reason for continuing the case as was done, and the plaintiff had no right to a trial by jury as was accorded to him, inasmuch as he did not ask for one in his petition and procured the discharge of a jury that was present, to whose sufficiency and competency as jurors no objection was made, and by whom the defendant in the court below and relator here expressed a willingness to have his case tried immediately. Plaintiff's subsequent application for a jury was obviously for delay. The law makes this class of cases summary in form of proceeding. For these reasons the mandamus prayed for is made peremptory, and the judge *a quo* is ordered to set down relator's case for trial by preference over all other cases and without a jury on the second day of the regular term of his court, April 8, 1873, and to have notice thereof immediately given to the parties.

*State ex rel. Pintado v. Judge Fifteenth Judicial District*, 149.

5. The plea of payment admits the existence of the debt, whose continuance will be presumed unless the defendant makes good his plea. *Landry v. Delas et al.*, 181.
6. It is no defense to a suit to plead that the plaintiff had said to the defendant that he would discontinue his suit if some other creditor would do the same. Such a promise would neither discharge the debt nor bar the action, because an agreement without consideration is not obligatory.

*Broadus et al. v. Nolley et al.*, 184.

7. Where in a suit to erase the mortgage of a third party, said party alleged that the mortgaged property had never been individually owned by the debtor of the plaintiffs, and that, even if it had been the property of said debtor, which was expressly denied, the mortgage was binding and operative, and that no valid reason existed in law to have it canceled: Held—That the two pleas were not contradictory, and that the judge *a quo* erred in ruling defendant to elect between them, because it was competent for the party to prove that the property seized not belonging to the debtor of the plaintiffs, they had no right or interest to inquire into the validity of the mortgage resting on it; and because it was also competent for said third party to establish at the same time that the mortgage in his favor was valid.

*Northern Bank of Kentucky v. Police Jury of Pointe Coupee*, 185.

**PLEADINGS—Continued.**

8. Where the plea of prescription is filed in this court, justice requires that the case shall be remanded, at the prayer of the plaintiff, in order that he may have an opportunity of introducing evidence to interrupt the prescription. *Taylor v. Woodward et al.*, 212.
9. An intervention can not be sustained where the demand is not incidental to the main action and where the intervenor neither joins the plaintiff in claiming the same thing, or any thing connected with it, nor unites with the defendant in resisting the claim of the plaintiff, nor claims a privilege on the proceeds of any thing which has been sold, or pretends to be the owner of the thing which has been seized. *Moreau v. Moreau*, 214.
10. The creditors of a succession have no right to intervene in proceedings by the heirs to compel an administrator to render his accounts. *Ibid.*
11. Where the demand of an intervenor does not grow out of the principal action and is not specially permitted by law, it must be dismissed. *Ibid.*
12. Where the rights of the plaintiff had neither been ascertained, nor could be ascertained until a settlement of his mother's succession had been had, he must prove this settlement, and then sue for a partition. *Ibid.*
13. An injunction will not be set aside for irregularities when it appears from the face of the papers that another would be issued. *Dupre v. Swafford*, 222.
14. Where it was pleaded that an injunction ought to be dissolved, because the party applying for it as tutrix set forth in her petition grounds which could have been urged in the defense to a petitory action against her individually: Held—That the plea is not valid. *Ibid.*
15. Where an exception to the suit was filed on the ground that the heir had been put in possession of the property and the administratrix could not be sued, and where, on said plea, the exception as to the administratrix was sustained, and the case was tried as to the heir: Held—That the suit should have been dismissed. *Martin v. Cannon*, 225.
16. A party should not be listened to, when urging technical irregularities in the proceedings to which he was himself a party, in order that he should enrich himself at the expense of others. *State ex rel. Bach v. Louisiana Levee Company*, 228.
17. Where the defendant was sued for two mortgage notes left with him on deposit, and required to restore them or pay the full amount thereof: Held—That defendant disclaiming any ownership of said notes and having no personal interest in them, has no defense to set up for himself, and has no right to plead one for a

## PLEADINGS—Continued.

third party and ask the court to pass upon a question that would not be binding if decided for or against that person.

*Ducros v. Gottschalk*, 233.

18. The plaintiff having alleged a final settlement, can not go behind it and demand the investigation and adjustment of the affairs of the partnership. Besides, it could not be done in this suit, which is for a specific sum. *Job v. Heuer*, 279.

19. Where the allegations and the prayer of the petition and the evidence adduced make it clear that the action is predicated upon a contract, the plaintiff can not recover on a *quantum meruit*.

*Mazureau & Hennen v. Morgan*, 281.

20. Where the plaintiff prayed for a mandamus to compel the Auditor to issue to him warrants on the State Treasury for compensation for mortgages recorded by him under the section 67 of act 42 of 1871, at the rate of \$1 50 per each mortgage, in accordance with the roll which he had furnished to the Auditor, and which is in the Auditor's possession : Held—That there is nothing in the record showing that the amount claimed exceeds five hundred dollars and vests jurisdiction in this court. It may be above or below that sum. The jurisdiction of the court must be apparent from the pleadings. It can not be guessed at.

*State ex. Recorder of Mortgages v. Clinton*, 285.

21. Where the exception was, that plaintiff, having claimed in her first petition only one-half of the commission allowed by law to executors, could not, in a supplemental one, claim the whole commission : Held—That she had the right to amend her pleadings, and that the exception could not be maintained.

*Hale v. Salter*, 320.

22. Where the plaintiff in execution contended that the builder's privilege was lost by the sale of the property in mass : Held—That said plaintiff, who proceeded with the sale in block, notwithstanding the third opponent's application for a separate appraisement, ought not to be heard setting up such a defense. He ought not to benefit by his own wrong.

*City of Baltimore v. Parlange*, 335.

23. The third opponent, having claimed part of the proceeds, has no right to demand that the sale be treated as an absolute nullity. Besides, it could only be set aside in a direct action.

*Ibid.*

24. Where the plaintiff, in a suit against D, seized certain bales of cotton by attachment, in the hands of A, to whom the cotton had been shipped, and A intervened, and alleged he had privilege on said cotton for advances to make it and for charges paid on the same, which was in his possession, and D bonded the property

**PLEADINGS—Continued.**

after the intervention of A: Held—That the intervention and third opposition could not be excepted to as premature. The intervention could not be considered as dismissed by the bonding. The bond remained in lieu of the property seized and released.

*Cass & Dowling v. Rouark*, 353.

25. The intervention could only be made while the suit was pending; and there is no good reason why the third opposition should not be made at the same time, in order that the relative rank of the contesting creditors should be settled in one suit. *Ibid.*
26. The plea that an agent had no right to stipulate the solidarity of the obligation sued on, is a matter of special defense, which should have been set up in defendant's answer. It can not be urged in error to a judgment rendered and confirmed by default.

*Gantt v. Eaton et al.*, 507.

27. Nothing can be assigned as an error of law which could have been cured by evidence legally given at the trial.

*Succession of Bailey*, 580.

28. An assignment of errors in this court can not cure the omission of the appellants to make opposition and present regularly the issues of fact which they desire adjudicated. *Ibid.*

29. The grounds for opposing the judgment placed on the tableau are such as should have been presented before its rendition, and can not be urged in this proceeding. If the heirs are injured by the failure of the administrators to set up those grounds, there is a remedy at the proper time and before the proper tribunal. Their prayer to amend the judgment can not be heard, because they are appellees. *Succession of Hart*, 583.

30. Where there is a discrepancy between the allegation and the document made part of the petition, the latter controls.

*Matthews v. Williams*, 585.

31. Where the plaintiff brought suit in his own name on a promissory note drawn payable to his wife or bearer, and which was executed by defendant for the price of certain lands, purchased by him from the wife, the same being her paraphernal property, and where it was contended on the part of the defendant that the facts in the case showed that the plaintiff did not have the administration of the wife's property; and it was contended, on the other part, that this was not a real action, and that by article 107 of the Code of Practice the plaintiff in this case had the right to sue for the debt due his wife: Held—That the ground assumed by plaintiff is correct, and that the fact that the husband brought the suit would seem to imply that he was administering the wife's paraphernal property. *Morton v. Copeland*, 592.

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PLEADINGS—Continued.

32. The defense set up that there is defect in the title to the land forming the consideration of the note sued upon can not be admitted, inasmuch as defendant does not allege in his answer, or show by testimony, that he has ever been threatened with eviction, or that he has ever been disturbed in his possession. *Ibid.*

SEE MORTGAGE, No. 14—*Pipes v. Norsworthy*, 557.

SEE ACTION—*Chavanne v. Frizola*, 76.

SEE EVIDENCE, Nos. 10, 11.

SEE COMPENSATION, No. 1—*Adams v. Webster*, 117.

SEE INJUNCTION, No. 7—*Lee v. Packard*, 397.

SEE JURISDICTION, No. 8—*Thibodeaux v. Voorhies*, 478.

PRACTICE.

1. It can not be contended, on the part of defendant, that, inasmuch as when the judgment was rendered and notice thereof served at her domicile, she was absent, or had gone out of the parish, it was necessary to appoint an attorney upon whom the service of the notice of judgment should have been made.

*Holbrook v. Bronson*, 51.

2. The appointment of persons to represent parties to a suit should be made with caution and in cases clearly designated. *Ibid*

3. The judgments in this case appointing a testamentary tutor and the mother of minors their natural tutrix, were not absolute nullities and can not be attacked collaterally.

*Succession of Pinner*, 53.

4. The title to property can not be attacked collaterally, and where a judgment creditor seizes property as belonging to his judgment debtor, but the title to which stands in the name of another, he assumes the burden of showing simulation.

*Pierce v. Clark and Sheriff*, 111.

5. A motion for a new trial can not be refused "with a view of allowing the Supreme Court to pass upon the rights of the parties, under the conviction that it is more than useless to put the parties to additional and unnecessary expense by submitting the case to another jury which would be composed as the one which tried the case under existing laws." This mode of proceeding and such strictures made in advance on the jury to which it might be submitted, can not be sanctioned. *Adams v. Webster*, 113.

6. Where the judge in a lower court is satisfied that the verdict of a jury is wrong, it is his duty to grant a new trial and not indirectly deprive the party of a trial by jury, by rendering what he believes to be an improper and unjust judgment with the view of having it revised on appeal. It might be that the verdict, on a second trial, would prove satisfactory to both parties. *Ibid.*

**PRACTICE—Continued.**

7. Where a motion as to the disqualifications of a grand juror, which rested on questions of facts, was overruled, and no bill of exceptions taken: Held—That the court could not look into the correctness of the ruling, not having jurisdiction of facts in criminal causes.  
*State v. Branch*, 115.
8. Where, before sentence was passed, a motion was made on behalf of the defendant in arrest of judgment, on the ground that the drawing of the grand jury was illegal, as shown by the minutes of the court, and where, on the trial of said motion, the minutes were allowed to be corrected and a bill of exceptions taken thereto: Held—That the minutes can at any time be corrected to make them correspond with the truth, and being under the eye of the judge, who by law takes part in the proceeding, no evidence is necessary.  
*Ibid.*
9. Where a judgment by default was entered before the delay required by law had expired, it will not be maintained as valid on the ground that it was not made final until after the usual delays and that the defendant, having thereby suffered no injury, can not complain.  
*Hart & Co. v. Nixon & Co.*, 133.
10. The words "ordinary course of practice" mean that the course which is positively commanded by the law shall be pursued.  
*Ibid.*
11. There is no difference between entering a default a day too soon and confirming a default a day too soon. One delay is as imperative as the other.  
*Ibid.*
12. There is no issue joined when the judgment by default has been improperly entered, and the judgment in confirmation has nothing to rest upon.  
*Ibid.*
13. There is no statutory provision of law requiring direct action against the sheriff to compel him to comply with what the plaintiff considers his adjudication, and to fix the respective rights of persons holding mortgages on the property sold under execution. The practice has always been to proceed by rule, and this practice has been expressly recognized by the decisions of this court.  
*Blair & Co. v. Taylor et al.*, 144.
14. A mortgage creditor has no right to injoin the sale of his debtor's property for want of notice of the application for the order, when the sale was ordered to pay creditors having a higher rank, or a preference over him.  
*Wells v. Wells*, 194.
15. Where creditors, who were by judgment entitled to be paid by preference intervened, and joining in the defense made by the executor of an estate against the injunction issued at the prayer of a creditor of an inferior rank, asked that the judgment be so amended as to allow them twenty per cent. damages on their

**PRACTICE—Continued.**

claims: Held—That they were not entitled to any increase of the amounts allowed them respectively on the executor's tableau. No act of one creditor, however illegal, can be the basis for enlarging the claims of other creditors against the common debtor, the succession. But the plaintiff, who, by injoining, has illegally obstructed the sale provoked by the executor, is liable to the succession for damages, and the prayer of the executor for an amendment of the judgment should be granted. *Ibid.*

16. The vendee evicted of the property by the foreclosure of a prior mortgage containing the pact *de non alienando* is not bound to defend the executory proceeding or to give notice thereof to the vendor. The undertaking of the purchaser is to pay the price; that of the vendor is to maintain the title and the possession.

*Ball et al. v. Estate of Sharpley Owen*, 195.

17. This court can go behind the judgment of the court *a qua* to see when the obligations sued on arose between the parties.

*Robert v. Coco*, 199

18. "If one demand less than is due him, and do not amend his petition in order to augment his demand, he shall lose the overplus." C. P. art. 156. *Stafford v. Stafford*, 223.

19. Where the defendant, after pleading to the merits, made a reconventional demand, and the judge refused to fix the cause for trial unless the defendant should give security for costs: Held—That there is no known law or practice which could justify his conduct, and that none had been referred to by said judge.

*State ex rel. Nelson v. Judge of the Sixth District Court, parish of Orleans*, 227.

20. The proceeding by rule is not new under the laws of this State, and whenever the Legislature authorizes it, that summary form of remedy may be adopted by litigants, and the want of citation or notice can not be pleaded by defendant. The delay allowed to answer would undoubtedly be extended by the court, on proper application, if insufficient.

*State ex rel. Morgan v. Kennard*, 238.

21. The penalty for not producing books and papers in obedience to a *subpoena duces tecum*, is not imprisonment for contempt. The consequence of the disobedience is, that the party who has obtained the subpoena has the right to ask that the facts which he states in his affidavit for the subpoena be taken as proved.

*Columbia Fire Company No. 5 v. Purell*, 283.

22. Where the books called for were produced on the day of the trial, and the defendant did not then move for a continuance in order to allow him time to examine them, but simply objected to going to trial: Held—That this was not sufficient. He should at least

**PRACTICE—Continued.**

have suggested to the court that he was deprived of some right, or that an examination of the books was necessary to enable him to make out his case. *Ibid.*

**23.** It is a rule of court, long since established, that unless personal service has been made upon a witness, no attachment to compel his attendance will be granted. *State v. Allemand*, 525.

**24.** No postponement or continuance will be granted unless accompanied by proof of due diligence. *Ibid.*

**25.** Where the administrator and the opponent to the tableau of distribution by said administrator have filed a written agreement to have the judgment dismissing the opposition reversed, and to reinstate the opposition, and to remand the case to be tried on its merits: Held—That this can not be done without the consent of all the parties interested, several of whom are not before the court, and that the case must be continued to have the creditors on the tableau cited according to law.

*Succession of Romero*, 534.

**26.** An intervenor is entitled to the delay necessary for service of citation and putting the intervention at issue.

*Sandel v. Douglas*, 564.

**SEE CITATION**, No. 3—*Bell v. Short*, 312.

**PAYMENT.**

**1.** Where a commercial firm, the payees of two promissory notes, due respectively in 1862 and 1863, instituted in April, 1870, suit against the indorser thereof, and where, on the payment thereof being established by notarial act, plaintiffs attempted to prove that it was made in Confederate notes, and contended that said payment was in violation of the non-intercourse laws, having been made at Shreveport, within the Confederate military lines, to one of the plaintiffs, who was a resident of New Orleans, then within the Federal lines, and whose authority, therefore, to represent the firm as its agent ceased to exist: Held—That whatever might be said of the acts of the said party in going through the prohibited lines, and its legal effects upon any contracts of his own or his firm, said firm, or any one of its members, can not now invoke the illegality of the said payment, or enforce a second payment. They can not be heard to urge their own unlawful conduct to their own benefit. The payment under such circumstances must be held binding upon both plaintiffs. *Rogers et al. v. Gibbs*, 563.

**SEE JUDGMENT**, No. 22—*Winston v. Nunez*, 476.

No. 36—*Guidry v. Jeanneaud*, 634.

**PARTITION.**

SEE SUCCESSION, No. 6—*Sevier v. Sargent*, 220.

SEE MARRIAGE, No. 9—*Lee v. Packard*, 397.

**PROMISSORY NOTES.**

SEE BILLS AND PROMISSORY NOTES.

**PARTNERSHIP.**

1. The prescription of three years set up against a suit for settlement of the affairs of a partnership is not applicable when no settlement of its business and no adjustment of the liabilities of the copartners among themselves have taken place.

*Benoist et al. v. Markey et al.*, 59.

2. In the case of a dormant or secret partner, although credit is manifestly given only to the ostensible partner, no other party being known, yet it is not deemed an exclusive credit, but is binding upon all for whom the partner acts, if done in their business and for their benefit. *Boudreaux v. Martinez et al.*, 167.

3. The creditor is not affected by the State of affairs between the partners *inter se*. A deceit or fraud between them has nothing to do with their obligations towards third persons who are not party to it. *Ibid.*

4. The circumstance that a woman is the concubine of her male partner, does not deprive her of an action for the settlement of affairs and a participation in profits derived from capital and labor which she contributed, though much of the property claimed is real estate standing in the copartner's name alone, and had never stood in her's. *Malady v. Malady*, 448.

5. The fact of the social relations which Mary B. Caldwell, one of the defendants in this case, has chosen to assume, can not deprive her of what justly belongs to her. She should be allowed to place her capital and industry against the capital and industry of William Malady, her paramour and copartner, and the property purchased during the time they have been living and working together, should be declared property in which they have a joint interest; one-half of it should be decreed to be the property of William Malady, and said half to belong to the community which existed between himself and his lawful wife, Mary Malady. *Ibid.*

6. Were it admitted that a partner can shield himself from responsibility by publishing that he will not be responsible for debts contracted by his copartners in the interest of their common venture, still the notice, even if sufficient, must be brought home to the party who contracts on the responsibility of the firm. His telling his partners that he would not be responsible, does not affect the plaintiff, who was not noticed. *Drum v. Hanna et al.*, 645.

**PARTNERSHIP—Continued.**

7. Under such circumstances, a copartner, who stood by and saw, without objections, a work done which was necessary for the prosecution of the business in which he was engaged, is bound to pay for it. *Ibid.*

**PRESCRIPTION.**

1. The prescription of three years set up against a suit for settlement of the affairs of a partnership is not applicable when no settlement of its business and no adjustment of the liabilities of the copartners among themselves have taken place.

*Benoist et al. v. Markey et al.*, 59.

2. Article 613 of the Code of Practice, concerning prescription, clearly refers to a *judgment in a contested suit*, but which has been obtained through fraud, or because the defendant had lost the receipt given by the plaintiff. Article 1994 Civil Code applies to acts made in fraud of creditors. *Fuentes v. Gaines*, 85.

3. The validity of a probated will is immaterial to third parties until they are disturbed under it in the possession of their property, and prescription against them could not begin to run until the cause of action had arisen; nor can prescription run against one in possession. *Ibid.*

4. A judgment of nonsuit based upon the mere failure of a plaintiff to appear, can not be regarded as a voluntary abandonment of the claim. The suit was sufficient to interrupt prescription.

*Locke v. Barrow*, 118.

5. Where it was contended that two judgments were not properly revived, only one petition for revival thereof being filed, and in one judgment the revival of said judgments being decreed: Held—That the prescription of the judgments was properly interrupted, because citation was served personally within ten years. Whether the application was made in one petition or in two is immaterial. The decree of revival for both judgments was rendered contradictorily with the defendant, who was personally cited within ten years. There is no law requiring this decree arresting prescription to be registered. *Carroll et al. v. Seip et al.*, 141.

6. Where the plea of prescription is filed in this court, justice requires that the case shall be remanded at the prayer of the plaintiff, in order that he may have an opportunity of introducing evidence to interrupt the prescription.

*Taylor v. Woodward et al.*, 212.

7. Where a final judgment was rendered, on the twelfth of April, 1869, against Juilliard, in the case of *Juilliard v. Rogay*, in which Juilliard had caused Rogay to be arrested on the ground of his departing permanently from the State without leaving therein sufficient property to satisfy the demand of his creditor: Held—

**PRESCRIPTION—Continued.**

That the prescription of one year can not be opposed by the surety on Juilliard's arrest bond against a suit instituted by Rogay on the fourth of December, 1869, to recover damages for his unlawful arrest in November, 1865, because his right of action did not accrue until the final judgment in his favor was rendered. Besides, it is not an action arising *ex delicto*. It is a suit upon a bond. It is an obligation entered into by the signers thereof, and can, therefore, be considered only as an obligation to be prescribed by the laws regulating the prescription of obligations, and not by the laws regulating the prescription of actions for damages arising from the commission of offenses or quasi offenses.

*Rogay v. Juilliard*, 305.

8. The action against the sureties of a sheriff for money collected by him and not accounted for to the party entitled to it, is barred by the prescription of two years. Revised Statutes of 1870, section 2816.

*Hugh v. Hernandez*, 360.

9. The law has not given the summary remedy by rule against sureties on a sheriff's bond, and where the rule was made absolute, and in a subsequent action of nullity, said judgment was set aside on the ground that no citation had been served on the parties, the prescription of two years was not interrupted by the instituting of such a proceeding against the parties.

*Ibid.*

10. Where the action is to make a telegraph company responsible for loss on goods, resulting from error in a telegraphic message, the prescription of one year does not apply. This action arises *ex contractu*, and not *ex delicto*.

*La Grange v. Southwestern Telegraph Company*, 383.

11. This action, as its character appears from the petition, is a suit for a tort or trespass; and the defendant is sought to be made liable *in solido* as a co-trespasser with another person, with whose trespass, it committed, he is in no manner connected. If such an action would lie against the defendant, it is certainly barred by the prescription of one year, which is pleaded.

*Whitehead v. Dugan*, 409.

12. The seizure of A's property under a suit against B, is a quasi offense, and the action based upon an obligation springing from a quasi offense is prescribed by one year.

*Lizardi v. New Orleans Canal and Banking Company*, 414.

13. Where it was contended that even if the source of the obligation incurred by the defendant be conceded to have been a quasi offense, such as the wrongful attachment of the plaintiff's property, still the prescription should not begin to run until the end of the wrongful act, for until then the amount of the damages done by the continuous attachment could not have been ascertained:

## PRESCRIPTION—Continued.

Held—That if there is good reason why the law regulating prescriptions in such cases ought to be as is contended, yet that this court has no right to alter the positive provisions of the code which declares that prescription runs from the date on which the injury or damage was sustained. But it is incumbent upon the party pleading prescription to show what portion of the damages proved occurred anterior to the year preceding the institution of the suit, or in other words, to establish what part of the plaintiff's demand is prescribed.

*Ibid.*

14. In fixing the rents due for the plantation seized, the highest estimate which the evidence will permit must be adopted, as the property was tortiously taken from the possession of the plaintiff.

*Ibid.*

15. A simple acknowledgment of a debt, when prescription is acquired, is not a renunciation of the prescription. In this case the evidence does not establish a positive promise to pay. At most, it was an offer to compromise by the payment of half, which was not accepted.

*Frellsen v. Gantt*, 476.

16. Where a debt was acknowledged in an act of mortgage and not represented by notes, the prescription of ten years is applicable.

*Seyburn v. Deyris*, 483.

17. The prescription of ten years was interrupted as to Widow Eugenie Deyris, by the note which she gave on the seventh of April, 1862, for the interest accrued during the years 1860, 1861 and 1862, and inasmuch as subsequently, on the twenty-eighth of February 1868, she waived prescription on this note.

*Ibid.*

18. The note signed on the first of January, 1868, by Eugenie Deyris, widow of Henry Penn, Sr., and by one of the heirs, Clara Penn, representing the interest for another year on the mortgage claim, did not amount to a renunciation of prescription by Clara Penn, as to her share of the past installment of the mortgage debt. That note contains no renunciation by her of the prescription already accrued.

*Ibid.*

19. The act of 1853 fixing the prescription of judgments at ten years from their rendition, also provides the only means by which it can be averted, and said prescription, therefore, can only be averted by complying with these requirements.

*Succession of Hardy*, 489.

20. The plea of prescription, filed by the administrator, can not extend its benefits to the heirs of age and the widow. As to the succession and the minors, it does—their interest being in the succession, and the succession being represented by the administrator, whose duty it is to interpose any legal defense in his power to a suit in which the succession he represents is interested.

*Banker v. Durand*, 511.

**PREScription—Continued.**

21. The plea of pre-scription filed in this court by defendant against plaintiffs, who allege the nullity of the judgment he relies upon, is not well taken. The plaintiffs, in pursuit of their rights, finding themselves opposed by what purports to be a superior mortgage to theirs, have the right to attack it and show its nullity.

*Kennedy v. Rust*, 554.

SEE BANKRUPTCY, No. 3—*Willard v. Brigham*, 600.

SEE JUDGMENT, No. 34—*Winter v. Touvoir et al.*, 611.

SEE WILLS AND TESTAMENTS, No. 15—*Succession of Dubreuil*, 370.

**PRIVILEGE AND LIEN.**

1. A commercial firm can not satisfy the remainder of their claims of 1866 for moneys and other supplies furnished to an agricultural firm, out of the proceeds of the crop of 1867, to the prejudice of another commercial firm who made all their advances in that year, and in whose possession part of the crop has been put by consignment and under a regular bill of lading before the issuing of a writ of sequestration.

*Given, Watts & Co. v. Alexander & Co.*, 71.

2. The article 3227 of the Civil Code does not give any privilege upon produce sold for cash. A sale for cash means that, when the property is delivered, the money is to be paid, and where not paid after delivery, so long as the property remains in the possession and under the control of the vendee, the vendor's lien remains as between the parties, but the lien does not follow it when it passes into the hands of innocent third parties. Vendors can not complain if they sell for cash and still allow purchasers to take away the goods without paying for the same. The fault being with them, the loss, if any, must be theirs also.

*Delgado & Co. v. Wilbur & Co.*, 82.

3. Where it was alleged in opposition to the claim of a necessitous widow, that the adjudication of a debtor's property to himself, created the vendor's privilege to secure the twelve months bond which he gave: Held—That an adjudication of this character does not create the vendor's privilege, because it does not transfer the ownership of the property, nor change the nature of the title and possession; that it neither satisfies the judgment, nor novates the debt; that it is not strictly a sale, but only a means by which a creditor acquires additional security for his debt.

*Succession of Heitzler*, 116.

4. Where the vendee was put in possession in Germany of a certain quantity of wine which he had bought in that country and that possession continued across the Atlantic: Held—That the vendor's privilege could not be stretched so far as to extend from the banks

## PRIVILEGE AND LIEN—Continued.

of the Rhine to the banks of the Mississippi, and be made to last during a voyage from one continent to the other.

*Loeb & Co. v. Blum*, 232.

5. A consignee's privilege can not prevail against the seizure made by judgment creditors, if not recorded prior to the seizure.

*Ibid.*

6. Where it was established that the plaintiff, master of a boat, was authorized by his employer, the captain of the boat, to collect freight bills of a certain amount which he held, with the understanding that said plaintiff accepted said amount of bills in settlement of his wages amounting to four hundred and sixteen dollars and fifteen cents, and advances to his employer amounting to two thousand dollars, and that said employer or the boat would make the amount of the bills good, if they could not be collected, and where it was admitted that plaintiff collected one thousand and thirty-eight dollars and thirty-five cents: Held—That of the sum thus collected there should have been imputed the amount due for the payment of plaintiff's wages, as the privileged claim.

*Kodowitch v. Siewerd et al.*, 315.

7. Where it was conceded that there was due to a builder, on his duly registered contract, a certain balance, after deducting partial payments previously made: Held—That for this amount of his judgment, the builder's privilege had effect as against the plaintiff and other mortgage creditors of the defendant in execution.

*City of Baltimore v. Parlange*, 335.

8. The attorney's fees and damages stipulated in the contract with the builder created no privilege.

*Ibid.*

9. Where there was a clause in the contract allowing the builder further compensation for extra work done under any alteration of the specifications that might be ordered, and there was no fixed sum or estimate for such extra work: Held—That the registry of the contract gave effect to no privilege to secure this indefinite amount.

*Ibid.*

10. The vendor's privilege attaches to the improvements put upon lots by the vendee, where the vendor is not opposed by any one entitled to or claiming a special privilege upon the buildings.

*Succession of Bouvet*, 431.

11. The objection that a widow claiming the benefit of the one thousand dollar reservation has lost her right to it by failing to register her claim as a privilege is without force. This provision for destitute widows and orphans is not to be regarded strictly as a privilege, and the recording of it is not necessary for its preservation. This claim must be paid in preference to all other debts, except for the vendor's privilege and expenses incurred in selling the

**PRIVILEGE AND LIEN—Continued.**

property, and where it conflicts with the lessor's privilege the latter must yield. *Ibid.*

12. Laborers have their privilege independent of and distinct from that of the furnisher of supplies, and each privilege attaches as against the owner of the crop produced.

*Lalanne v. Goodbee*, 481.

SEE COMMUNITY, No. 3—*Lemoine v. Powers*, 514.

SEE DEPOSIT, Nos. 3, 4, 5, 6—*Lanoue v. Dumartrait*, 478.

**PRINCIPAL AND AGENT.**

1. Where a power of attorney is given to an agent "to make checks and draw money out of any bank or banks wherein the same may have been deposited in the name or for account of the principal," the fact that a sufficient amount to meet the check was not deposited when the check was drawn is not a valid defense, and does not authorize the principal to refuse paying it in the hands of a party who had no notice of the prohibition put upon the agent.

*Crescent City Bank v. Hernandez*, 43.

2. It is better that the immediate employer and principal of an agent should suffer by the imprudence of his employe than that third parties should suffer from those acts of agents which are recognized by the public as valid, because of the confidence reposed in the principal. *Ibid.*

3. Where an agent issues a commercial obligation authorized by the terms of his mandate, the legal presumption is that it was for a valuable consideration which has actually accrued to the benefit of his principal, and that, therefore, the principal is bound by it; and third parties who, acting on the presumption, receive such negotiable obligations, are protected against the equities of which they have no notice. *Ibid.*

4. Where a bank, acting as agent for collecting certain drafts, took Confederate money on the ground that there was at the time no other currency to be had in New Orleans or in any other part of the Southern Confederacy: Held—That the bank should have collected the drafts in lawful currency, and that if this was impossible, it should have given notice thereof to the principal, or should show that the collection was in that currency and approved by him.

*Waterhouse, Pearl & Co. v. Citizens' Bank of Louisiana*, 77.

5. The sale by an agent after the owner had sold the property conferred no title. The power to sell was impliedly revoked by the owner's sale. In this case no damage is shown to have been done to the plaintiffs. They had not paid for the price, and within an hour or two after the agreement to sell to them, they were informed that the property had been previously sold by the owner and for less than they had agreed to give. *Torre v. Thiele*, 418.

## PRINCIPAL AND AGENT—Continued.

6. Where the defendant acted merely as an agent and exhibited his authority, neither doing nor saying anything by which he obligated himself to pay the plaintiff any sum whatever, and nothing was mentioned between them as to compensation; but, on the contrary, notice was given to the plaintiff that the services which he had been bespoken to perform, were desired from another person: Held—That whether the plaintiff has or not any legal claim against the principal, it is clear that he has none against the defendant.

*Rosenthal v. Myers*, 463.

## POLICE JURY.

1. Police juries are not prohibited from appointing a district attorney *pro tempore* after the lapse of the thirty days mentioned in the statute creating that office. But in that event the statute confers the same power on the parish judges, and the party that first exercises the power exhausts it. The purpose of the law is to guard against the probability of a vacancy.

*State ex rel. Gorham v. Montgomery*, 138.

2. A police jury is not a legislative body, and its members are not legislators who become *functi officio* with the expiration of the terms for which they were elected or appointed, but can lawfully administer the powers confided to them till their successors are elected and qualified. Revised Statutes of 1870, sec. 2608. *Ibid.*
3. A police juryman is not an officer in the intendment of that clause of the constitution prohibiting a person from holding more than one office, except that of justice of the peace. That clause of the constitution applies only to constitutional offices, and does not prevent a constitutional officer from holding a municipal office.

*Ibid.*

4. When the ordinance of the police jury which is complained of in this case was passed, the revenue law of 1871 was in force, even if such authorization was necessary. The tax imposed by the ordinance was authorized by that law, and having been levied under it, it can not be held that the action of the police jury was illegal.

*Jones v. Grady*, 586.

5. Police juries are not restricted in their action in regard to licenses exacted by them for the right of selling liquor and retailing spirituous liquors to the amount exacted by the State for the same.

*Ibid.*

6. Section 2778, Revised Statutes, means that whenever the police jury deems it necessary that the sense of the people should be taken as to the propriety of permitting grog shops to be licensed, a vote may be ordered. But when this shall be deemed necessary, is a matter entirely within the discretion of the police jury.

*Ibid.*

SEE TAXATION AND TAXES, No. 20—*Maurin v. Smith*, 445.

**PROHIBITION.**

1. A writ of prohibition will only be issued in aid of the appellate jurisdiction of this court. It is not necessary, where, on the judgment being rendered in the court below, the case can be brought before this court for review, and the question of jurisdiction be decided.

*State ex rel. Caballero v. Judge of the Second District Court, parish of Orleans*, 381.

**PLEDGE.**

1. A factor can not secure his individual creditor by pledging the planter's cotton which has been confided to him for sale. That power is not conferred by act No. 150 of the acts of 1868, entitled "An Act to prevent the issue of false receipts or bills of lading and to punish fraudulent transfers of property by cotton presses, wharfingers and others." There is nothing in the statute showing any intention of the legislator to enlarge the powers of factors, or to give them the right to pledge the property confided to them for sale.

*Young v. Scott & Cage*, 313.

**QUASI OFFENSE.**

SEE PRESCRIPTION, Nos. 12, 13—*Lizardi v. New Orleans Canal and Banking Company*, 414.

**RES JUDICATA.**

SEE COURTS, No. 25—*Copley v. Dinkgrave*, 577.

SEE JUDGMENT, NO.—*Fuentes v. Gaines*, 85.

No. 21—*Succession of Milton Taylor*, 446.

**REGISTRY.**

1. The object of registry both of sales and mortgages is notice, and when the recorder registers a private sale, whether he has done so on sufficient proof is immaterial as regards notice to the public; the object of the law is fulfilled, and subsequent purchasers are affected.  
*Pierce v. Clark and sheriff*, 111.
2. The failure of the recorder to inscribe with the instrument the proof upon which he admits it to registry does not render the registry null.  
*Ibid.*
3. Where it was contended that two judgments were not properly revived, only one petition for revival thereof being filed, and in one judgment the revival of said judgments being decreed Held—That the prescription of the judgments was properly interrupted, because citation was served personally within ten years. Whether the application was made in one petition or in two is immaterial. The decree of revival for both judgments was rendered contradictorily with the defendant, who was personally cited within ten years. There is no law requiring this decree arresting prescription to be registered.

*Carroll et al. v. Seip et al.*, 141.

## REGISTRY—Continued.

4. A judicial mortgage, like any other, must be reinscribed within ten years from the first inscription in order to preserve the rank acquired by said inscription. *Ibid.*
5. Where it was contended that a mortgage was not recorded until after the passage of the homestead law, and that it was therefore governed by it: Held—That this is an error. The right was created before the passage of the law, and existed when it was enacted. Subsequent legislation could not destroy it. The mortgage existed independent of its registry. Registry is intended to protect third parties, not parties to the contract.

*Mills v. Sheriff of East Feliciana*, 142.

6. The mere recital of an act of mortgage in a subsequent act acknowledging the obligations contained in the first act, does not, as to third parties at least, operate the reinscription of the first act. The subsequent acknowledgment may be sufficient to interrupt prescription as to the debt, but does not reincribe the mortgage which secured it.

*Blair & Co. v. Taylor et al.*, 144.

7. There is no law which directs a book to be kept in the parish recorders' offices for the recording of tutors' bonds, and this court is not satisfied that the recording of a tutor's bond in a book kept for the recording of any particular kind of bonds, or for the recording generally of bonds of every kind, would suffice to operate as notice of a minor's mortgage, where in the same office are kept the books in which the law directs mortgages to be inscribed.

*Fisher v. Tunnard*, 179.

8. It has been frequently held that in the country parishes the registry of a mortgage in the conveyance book in which all mortgages and privileges are recorded, is sufficient, if separate books be not kept; but if there be a separate registry of mortgages, the mortgage must be inscribed in it. *Ibid.*

9. Where a wife had obtained a judgment against her husband, under which his property had been sold and purchased by her: Held—That after her purchase the judgment creditors of her husband could seize the same property as his, and that the wife had not the right to injoin the sale thereof, inasmuch as the sale to her was not recorded in the recorder's office.

*Nancy Doughty v. Sheriff et al.*, 290.

10. Where, instead of procuring and recording, according to law, certified copies of judgments as directed by city ordinance No. 1630, administration series, the plaintiff followed the provisions in section 12 of act No. 73 of 1872, by which a special mode was provided for recording the taxes due to the city without any cost to the city: Held—That if the provisions of this act are resorted to in

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REGISTRY—Continued.

preparing and inscribing the tax judgments to preserve the lien and mortgage in favor of the city, its provisions in regard to compensation must be enforced. It is only by the terms of this law that the lists or registers prepared by the plaintiff can have effect as a legal inscription. But this inscription was to be made without cost to the city. Outside of this law the said registers or inscriptions of judgments, as made by plaintiff, are without effect. The inscriptions are not made in the books of privileges and mortgages required by the general law on the subject.

*Southworth v. City of New Orleans*, 333.

SEE PRIVILEGE, No. 11—*Succession of Bouvet*, 431.

SEE DEPOSIT, No. 6—*Lanoue v. Dumartrait*, 478.

SEE JUDGMENT, No. 33—*Winter v. Tounoir et al.*, 611.

SEE MORTGAGE, Nos. 15, 16—*Pouts v. Reggio et al.*, 637.

## RECORD.

SEE APPEAL, No. 21—*Coco v. Thieneman et al.*, 236.

## SUCCESSION.

1. Where the heirs have been put in possession of the succession of their father and mother by the Probate Court, the succession is terminated. The property passes to the heirs and the debts of the deceased become the debts of the heirs, each being liable for his virile share. The application for administration is too late, and if the appellant be a creditor, his remedy is against the heirs.  
*Successions of Dunford & Remi*, 56.

2. Where it might be true that, technically, a widow had never qualified as administratrix of her husband's succession, yet where she qualified as tutrix to her minor children, she necessarily became administratrix of his succession, and payment to her as such of a debt due to the succession would be valid. *Locke v. Barrow*, 118.

3. Where the creditors of a succession opposed the final account of the administratrix of said succession on the ground that a district court judgment for several thousand dollars in their favor was not placed on said account and paid: Held—That the administratrix could not, in the parish court, dispute the final judgment against her in behalf of the opponents; first, because a judgment not absolutely void can not be attacked collaterally; second, because the parish court can not revise a judgment of the district court, and also because the parish court can not determine a controversy when the matter in dispute exceeds \$500, for want of jurisdiction *ratione materiae*. The administratrix should not have omitted to place the claim of the opponents on her final account and to provide for its payment, because the process of garnishment had been resorted to against one of the opponents by a third party.

*Succession of Neal*, 125.

## SUCCESSION—Continued.

4. The parish court charged with the duty of settling successions has nothing to do with the partition of property held in indivision where the matter in dispute exceeds five hundred dollars.

*Johnson v. Labatt*, 143.

5. Where a judgment creditor with special mortgage and vendor's privilege caused a *fi. fa.* to be issued by the district court against the property of a succession, which *fi. fa.* was enjoined by the executor of said succession, and where, whilst the injunction was pending said executor applied to the parish court for the sale of all the property of the succession, including the property involved in the injunction for the purpose of paying the debts of the succession, and the court refused to order the sale of the property on the ground that it was in the jurisdiction of the district court for the time being, by virtue of the seizure and custody of the sheriff, pursuant to its writ: Held—That the court erred in not granting the order prayed for by the executor. Succession property can not be sold under a *fi. fa.* The executor was in possession of the property when seized, and the probate court had jurisdiction to order the sale. The creditor had a mortgage on the property, but he saw fit to pursue the *via ordinaria*, and having elected that mode of procedure, he could not have been allowed to change it after he had obtained judgment, even if he had attempted to do so, which he has not done. No injury can result to the judgment creditor by authorizing the sale prayed for by the executor if he has a mortgage superior to other creditors.

*Succession of Patrick*, 154.

6. Where a note for a certain sum of money was found in the succession of the father of the maker's wife, and was alleged to have been given in acknowledgment of an *avancement d'hoirie* to said wife, who subsequently died, leaving minors for her heirs: Held—That said note being given in the individual name of the maker must be considered as his individual debt, and is not subject to collation on the part of the minors in the succession of their grandfather, and that, even admitting said note to have been an acknowledgment of indebtedness by the drawer in the name of his children, a tutor has no right to make such an acknowledgment.

*Succession of Landry v. Peray*, 183.

7. Where creditors, who were by judgment entitled to be paid by preference, intervened, and joining in the defense made by the executor of an estate against the injunction issued at the prayer of a creditor of an inferior rank, asked that the judgment be so amended as to allow them twenty per cent. damages on their claims: Held—That they were not entitled to any increase of the amounts allowed them respectively on the executor's tableau. No

**SUCCESSION—Continued.**

act of one creditor, however illegal, can be the basis for enlarging the claims of other creditors against the common debtor, the succession. But the plaintiff who, by injoining, has illegally obstructed the sale provoked by the executor, is liable to the succession for damages, and the prayer of the executor for an amendment of the judgment should be granted.

*Wells v. Wells*, 194.

8. Where the heirs were put in possession of the property of their ancestor, if the partition between them be defective as a judicial partition, it is certainly valid as a conventional one, all being of age and signing the act. *Sevier et al. v. Sargent et al.*, 220.
9. Where the heirs went into possession and partitioned the property, the succession was wound up, because it ceased to exist. A creditor of the deceased became the creditor of his heirs, each being bound to him for his share of their ancestor's debt. If some of the heirs are not solvent, and the creditor may lose part of his claim, the fault is attributable to himself; he might have required security from the heirs before they obtained actual delivery of the inherited property. *Ibid.*
10. Where the plaintiffs claimed one-half of a certain lot of ground as heirs to their deceased mother, who had an undivided community of interest in said lot, now in possession of defendant: Held—That plaintiffs had no cause of action, inasmuch as it was not shown that the community between the plaintiffs' father and mother had been settled, nor that anything remained after paying the debts thereof, nor that plaintiffs had been put in possession of their mother's estate. *Phelan v. Ax*, 379.
11. Where in a suit instituted for partition by plaintiff against her coheirs, a curator *ad hoc* was appointed, on the prayer of the plaintiff, to one of said heirs who was a minor, the appointment was erroneous. *Malone v. Casey*, 466.
12. Where the heirs neither expressly nor tacitly have accepted unconditionally the succession of their ancestor, but where, on the contrary, on their being sued, they expressly circumscribed their liability, as they had a right to do, to the value of their ancestor's estate, a judgment which, under such circumstances, condemns them personally is erroneous. *Banker v. Durand*, 511.

SEE JUDGMENT, Nos. 30, 31—*Miguez v. Delahoussaye*, 531.

SEE EXECUTOR AND ADMINISTRATOR, Nos. 16, 17, 18, 19—*Suc-  
cession of Caballero*, 646.

SEE WILLS AND TESTAMENTS, No. 15—*Succession of Manette  
Dubreuil*, 370.

STAMPS—U. S.

SEE EVIDENCE, Nos. 20, 21—*Pavy v. Bertinot*, 469.

**Straight University.**

SEE CORPORATION, Nos. 3, 4, 5—*State ex rel. Straight University v. Graham*, 440.

**SEIZURE AND SEIZURE SALES.**

1. The objection that, when the release bond in this case was signed on the first of July, 1868, there was no law authorizing the release on bond of property provisionally seized, is not well taken. It was authorized by the act of the sixth July, 1867. See Revised Statutes of 1870, section 1914. *Lepretre v. Barthet*, 124.

2. As a general rule the judicial surety, a solidary obligor, can not be proceeded against, until the necessary steps are taken to enforce judgment against the principal debtor. R. C. 3066. But when a change happens in the debtor's estate, so that execution can not be issued against it, the judgment creditor may proceed at once against the surety. *Ibid.*

3. Where the condition of the bond to release property provisionally seized is, "that the debtor shall pay such judgment as may be rendered against him," the fact that the property thus seized remains in the hands of the debtor after the release bond was given, does not discharge the bond, or release the surety. *Ibid.*

4. A release in a case of provisional seizure can not be considered as an ordinary conventional obligation to which may be applied the principle that: As one binds himself, so shall he be bound. It is no valid commutative contract between the plaintiff and the surety defendant on the bond. As a public officer, the sheriff has not the authority, nor is it his duty, to make a contract of this character in which there can exist no reciprocal obligation.

*Urquhart v. Carvin*, 218.

5. An order of seizure and sale should not be enjoined for insufficiency of the evidence upon which it was rendered. The remedy is an appeal. This is undoubtedly so, where a judgment is sought to be revised on that ground. *Naughton v. Dinkgrave*, 538.

6. In this case a devolutive instead of a suspensive appeal was taken, and while the court below had lost jurisdiction of the case by reason of the appeal, the appellant obtained an injunction to restrain the execution of the judgment on the ground of the insufficiency of the proof on which the order of seizure and sale had been rendered. Whether or not the evidence was sufficient, was a question for this court to decide in revising the appeal from the order of seizure and sale, and which the district judge had no right to determine in an injunction proceeding. *Ibid.*

SEE APPEAL, No. 42—*Jennings v. McConnico*, 651.

SEE JUDGMENT, No. 10—*Pierce v. Clark*, 111.

**STATE WARRANTS.**

SEE OFFICE AND OFFICERS, Nos. 14, 15—*State ex rel. Strauss v. Dubuclet*, 161.

SEE TAXES AND TAXATION, No. 19—*State v. Lemarié*, 412.

**SERVITUDE.**

1. Servitudes, when an act of sale is silent on the subject, can only be shown by proof of the use or existence thereof for a period sufficient to establish title, and this may be proved by parol. All agreements in relation to such use may also be proved by parol, unless it is shown that they were reduced to writing.

*Machea v. Avegno*, 55.

2. The evidence in this case shows that the alleged servitudes were subject to the will of the owner of the property on which they were exercised, and that the owner or owners of the other property in whose behalf said servitudes were claimed to be established never acquired any legal title thereto.

*Ibid.*

**SURETY.**

1. The sheriff, when effecting a sale, has the right to exercise his judgment as to the solvency and sufficiency of the security offered, and to require bidders to be prepared at once to comply with the conditions of the sale, article 689 Code of Practice.

*Michel v. Kaiser et al.*, 57.

2. As a general rule the judicial surety, a solidary obligor, can not be proceeded against, until the necessary steps are taken to enforce judgment against the principal debtor. R. C. 3066. But when a change happens in the debtor's estate, so that execution can not be issued against it, the judgment creditor may proceed at once against the surety.

*Lepretre v. Barthet*, 124.

3. Where the condition of the bond to release property provisionally seized is, "that the debtor shall pay such judgment as may be rendered against him," the fact that the property thus seized remains in the hands of the debtor after the release bond was given, does not discharge the bond, or release the surety.

*Ibid.*

4. An administrator exceeds his proper functions when he enters into an agreement with the debtors of an estate to extend the terms of payment beyond that fixed by the original contract. The exercise of such a power by an administrator may be assimilated to acts done by agents which do not come within the purview of their powers, and which are therefore not regarded as binding on their principals. Therefore the defendants' plea in this case that they are not bound as sureties on the notes sued upon, for the reason that the plaintiff gave an extension of time to the principals without their knowledge and consent, is not well founded.

*Landry v. Delas, et al.*, 181.

**SURETY—Continued.**

5. If the appellant, when called on, does not adduce proof affirmatively to show that his surety is good, and no evidence to impeach him is offered, it is now the jurisprudence of this court that the judge *a quo* can not pronounce him to be insufficient and order execution to issue. Some proof is necessary to destroy the presumption of sufficiency arising from the acceptance of the bond, with the surety signing it

*State ex rel. Hays v. Judge of the Fifth District Court, parish of Orleans*, 616.

SEE APPFAL, No. 40—*State ex rel. Silverstein v. Judge of the Fifth District Court, parish of Orleans*, 622.

SEE BONDS.

SEE PRESCRIPTION, Nos. 8, 9—*Hugh v. Hernandez*, 360.

SEE JURISDICTION, No. 6—*Larue v. Vanhorn*, 445.

SEE EXECUTOR AND ADMINISTRATOR, Nos. 11, 12—*Succession of Leontine Guilbeau*, 474.

**SLAVES.**

SEE JUDGMENT, No. 18—*Bruin v. Sasser*, 224.

No. 19—*Consolidated Association of the Planters of Louisiana v. Blane*, 226.

No. 27, 28—*Lindstrum v. Ewing*, 520.

No. 35—*Winter v. Tounoir et al.*, 611.

SEE MARRAIGE, Nos. 17, 18—*Pierre v. Fontenette*, 617.

SEE BILLS AND PROMISSORY NOTES, No. 21—*Duperier v. Darby*.

No. 9—*Poydras v. Poydras*, 405.

SEE SHERIFF, No. 5—*Hall & Co. v. Chacheré*.

**SHERIFF AND SHERIFF'S SALES.**

1. The sheriff, when effecting a sale, has the right to exercise his judgment as to the solvency and sufficiency of the security offered, and to require bidders to be prepared at once to comply with the conditions of the sale. Art. 689 Code of Practice.

*Michel v. Kaiser et al.*, 57.

2. There is no statutory provision of law requiring direct action against the sheriff to compel him to comply with what the plaintiff considers his adjudication, and to fix the respective rights of persons holding mortgages on the property sold under execution. The practice has always been to proceed by rule, and this practice has been expressly recognized by the decisions of this court.

*Blair & Co. v. Taylor et al.*, 144.

3. A release in case of provisional seizure can not be considered as an ordinary conventional obligation to which may be applied the principle that: As one binds himself, so shall he be bound. It is no valid commutative contract between the plaintiff and the surety, defendant on the bond. As a public officer, the sheriff has

**SHERIFF AND SHERIFF'S SALES—Continued.**

not the authority, nor is it his duty, to make a contract of this character in which there can exist no reciprocal obligation.

*Urquhart v. Carvin*, 218.

- 4 Where a motion was made to quash the panel of the jurors, on the ground that the Criminal Sheriff has no legal right to furnish a list of persons liable to jury duty, keep the same in the Criminal Court, and array juries therefrom, because said list should be furnished by the sheriff for the civil courts, in conformity with section 2144 R. S., which says: "It shall be the duty of the sheriff of the parish of Orleans, in the month of December, to furnish a list of all persons liable to jury duty residing within the limits of the parish of Orleans:" Held—That the sheriff for the Criminal Court is a sheriff of the parish of Orleans, as much as the sheriff for the civil courts, and the constitution makes him the executive officer of the Criminal Court. It is his duty, as such executive officer, to perform the duty imposed by the above law and section 2147 R. S. He is specially and solely the executive officer of that court.

*State v. Burns*, 302.

5. The plea that a part of the price bid at the sheriff's sale was for slaves contrarily to the jurisprudence of this State, can not be allowed when, to all intents and purposes, the sheriff's sale has become an executed contract, and the contest between the parties relates only to the distribution of the price.

*Hall et al. v. Chachere et al.*, 493.

6. When there was no law authorizing the sheriff to advertise and sell, as he did, the cotton plantation of the plaintiff under the judgment of the defendants, in lots of from ten to fifty acres, disregarding the plaintiff's notice that he desired it sold in block and not according to the advertisement; and where, in defense of his act, the sheriff contended that, before the day of sale, he had notified the plaintiff to inform him whether he desired the property thus advertised to be sold in lots or in block, and that plaintiff, having refused to give any instructions, had no cause to complain: Held—That in forced sales the forms of law must be strictly complied with, and that, in this case the defect in the sheriff's proceedings could not be cured in the manner attempted by him.

*Morrison v. Flournoy*, 545.

7. Property advertised to be sold in lots of from ten to fifty acres could not be legally sold in block, and the plaintiff, at this stage of the proceedings, was not bound to give any directions to the sheriff, or to give any consent to the manner of selling his property. He had the right to require a legal advertisement, and was not bound to waive it by giving instructions to the sheriff concerning the sale.

*Ibid.*

SEE CRIMINAL LAW AND PRACTICE.

SEE EVIDENCE, No. 27.—*Mouton v. Broussard*, 497.

**SECRETARY OF STATE.**

**SEE CONSTITUTION AND CONSTITUTIONAL LAW, Nos. 15, 16, 17,  
18—Whited v. Lewis, 568.**

**STATE COMMISSIONERS.**

1. It was clearly the purpose of the Legislature, by the act of 1840, enlarging the powers of commissioners for the State residing in other States, to confer upon them the usual powers and functions belonging to notaries by the laws of this State.

*Puckett v. Law*, 595.

**SALES.**

1. The purchaser at a judicial sale is protected by the decree ordering the sale, and is not bound to look beyond it.

*Succession of Penniger*, 53.

2. The services of special tutors *ad hoc* are not necessary to effect a sale of minors property.

*Ibid.*

3. The sheriff, when effecting a sale, has the right to exercise his judgment as to the solvency and sufficiency of the security offered; and to require bidders to be prepared at once to comply with the conditions of the sale. Article 689, Code of Practice.

*Michel v. Kaiser et al.*, 57.

4. Where it was alleged, in opposition to the claim of a necessitous widow, that the adjudication of a debtor's property to himself, created the vendor's privilege to secure the twelve months bond which he gave: Held—That an adjudication of this character does not create the vendor's privilege, because it does not transfer the ownership of the property, nor change the nature of the title and possession; that it neither satisfies the judgment, nor novates the debt; that it is not strictly a sale, but only a means by which a creditor acquires additional security for his debt.

*Succession of Heitzler*, 116.

5. Where the plaintiff's mortgage was in existence at the time of the sheriff's sale, and the mortgaged property was adjudicated to him, he had the right to retain the purchase money up to the amount of his debt, and the title to the property should have been made to him.

*Blair & Co. v. Taylor et al.*, 144.

6. Where A had the right to sell the share she claimed to have in a piece of property, it is immaterial to inquire whether she owned any portion of said property. Having sold the whole of it and received the price thereof, she was bound to complete the title, and the moment she acquired the same, it inured to and vested in her vendees. Their title became as complete as if she had executed to them a deed immediately after she had acquired said property. Her reconveyance of it to him from whom she had purchased it, passed no title. It was the sale of another's property, and therefore a nullity.

*Crocker et al v. Hoag et al.*, 159.

**SALES—Continued.**

7. The third opponent, having claimed part of the proceeds, has no right to demand that the sale be treated as an absolute nullity. Besides, it could only be set aside in a direct action.

*City of Baltimore v. Parlange*, 335.

8. A vendor can not contest his own acts. On the contrary, he is bound to warrant their legality. If the defendant in this case had title to the whole of the property she caused to be sold, her title was divested by the sale which she provoked, and the interest she acquired in it as one of the purchasers thereof is only the interest of a coproprietor. This interest is joint, and her right to the possession, use and enjoyment thereof is also joint, not exclusive.

*Littell v. Wackerhagen*, 529.

SEE SHERIFF AND SHERIFF'S SALES, Nos. 6, 7—*Morrison v. Flournoy*, 545.

SEE JUDGMENT, Nos. 25, 26—*McWaters v. Smith*, 515.

**STOCKHOLDERS AND STOCKS.**

1. On a motion to dismiss an appeal on the ground that the matter in dispute does not exceed five hundred dollars, the amount of defendant's liabilities on a stock note as stockholder in a company will determine the jurisdiction of the court and not the percentage claimed thereon. It must be first ascertained if he is liable on the stock note itself, as alleged in the petition.

*Peychaud v. Weber*, 133.

2. A stockholder can not, when sued, call into question the name borne by a company and mentioned in his stock note at the time it was given, and it rests with him to show that the contribution called for is not needed.

*Ibid.*

3. There seeming to be no special denial of defendants in this case, of their obligation to issue certificates of stock to the owners thereof, the proceeding by mandamus is authorized to compel them to do so, if the ownership is not disputed.

*State ex rel. Philips v. New Orleans Gas Light Company*, 413.

4. The loss of plaintiff's certificates and the advertisement thereof being sufficiently established, the defendants can not refuse to issue new certificates on the ground that a bond of indemnity is not furnished. There is no good reason for requiring such a bond. The stock can not be transferred by relator except upon the books of the respondent and on the production of the certificates. This is sufficient protection to the company.

*Ibid.*

5. Where the question was as to the validity of the transfer of stock, on the ground that it was not made in accordance with the formalities required by the charter of the company: Held—That if the consent of the directors to the transfer was not obtained in a formal convocation of the board, yet the assent of a majority of the directors appeared to have been given and in the manner that transfers of stock were frequently made. This is sufficient.

*Ellison et al. v. Schneider et al.*, 435.

**SUBROGATION.**

1. Where A is a solidary obligor with B, by paying the note he becomes legally subrogated, for the amount of one-half thereof, to the entire obligation of B to the original holder. This subrogation extends as well to the accessory as to the principal obligation, and the subrogee acquires all the remedies as well as all the rights of the party to whom he was subrogated. Without the remedy of seizure and sale the subrogation would be incomplete. A was not a mere transferree who could not proceed *via executiva* without an act of subrogation. He was legally subrogated, and as such was thoroughly invested with all the rights of the original holder or payee, as if the same had passed to him by a regular act of conventional subrogation. *Durac v. Ferrari*, 80.
2. Where it appeared that A borrowed a certain sum of money from B, with the avowed intention of discharging notes given to C, and with subrogation of C's rights of mortgage, but C was not a party to this act: Held—That A had no authority in law to subrogate B to C's rights without C's knowledge or consent. *Hoyle v. Cazabat*, 438.

**SEE JUDGMENT, No. 5—Mississippi and Mexican Gulf Ship Canal Company v. Noyes et al.**, 62.

**SHIPPING.**

1. The attempt to make the seller and shipper responsible for the loss of the goods shipped must fail, where he had no instructions or authority to insure said goods, and the evidence does not show that this was incumbent upon him by the custom at the place of shipment. *Hanan & Richards v. Bowles*, 453.

**SEE CARRIERS.**

**TUTORS AND TUTORSHIP.**

1. The judgments in this case appointing a testamentary tutor and the mother of minors their natural tutrix were not absolute nullities, and can not be attacked collaterally. Where a divorced wife marries again, and after the death of her first husband, claims to exercise her rights of tutorship by nature over the issue of her first marriage: Held—That the forfeiture announced in article 254 of the Revised Code has no application to her case. *Succession of Pinniger*, 53.
2. There is no law prohibiting a divorced wife from becoming natural tutrix of her children after the death of their father. *Ibid.*
3. The fact that there are no special tutors *ad hoc* appointed for minors at the time of the sale of their property does not concern the purchaser. *Ibid.*
4. The services of special tutors *ad hoc* are not necessary to effect a sale of minors' property. Their duty begins at the partition before the notary; if not appointed at the time of the sale, they

## TUTORS AND TUTORSHIP—Continued.

may be appointed afterwards and before the notary begins the partition.

*Ibid.*

5. Where it might be true that, technically, a widow had never qualified as administratrix of her husband's succession, yet where she qualified as tutrix to her minor children, she necessarily became administratrix of his succession, and payment to her as such of a debt due to the succession would be valid.

*Locke v. Barrow*, 118.

6. Where the creditors of a succession opposed the final account of the administratrix of said succession on the ground that a district court judgment for several thousand dollars in their favor was not placed on said account and paid: Held—That the administratrix could not, in the parish court, dispute the final judgment against her in behalf of the opponents; first, because a judgment not absolutely void can not be attacked collaterally; second, because the parish court can not revise a judgment of the district court, and also because the parish court can not determine a controversy when the matter in dispute exceeds \$500, for want of jurisdiction *ratione materiae*. The administratrix should not have omitted to place the claim of the opponents on her final account and to provide for its payment, because the process of garnishment had been resorted to against one of the opponents by a third party.

*Succession of Neal*, 125.

7. Where a note for a certain sum of money was found in the succession of the father of the maker's wife, and was alleged to have been given in acknowledgment of an *avancement d'hoirie* to said wife, who subsequently died, leaving minors for her heirs: Held—That said note being given in the individual name of the maker must be considered as his individual debt, and is not subject to collation on the part of the minors in the succession of their grandfather, and that, even admitting said note to have been an acknowledgment of indebtedness by the drawer in the name of his children, a tutor has no right to make such an acknowledgment.

*Succession of Landry v. Peray*, 183.

8. Where A was appointed by will tutor to minors, and at the same time the testator declared that the care, management and raising of his children should be left in the hands of Miss B: Held—That this was not appointing her tutrix; that this was merely giving her the personal care of the children, whilst the legal control of the persons and property of the minors was vested in A, who could as tutor, when he chose, remove them from her care.

*Succession of Payne*, 202.

9. On the plea that a tutrix can not authorize another person to bind the minors on an injunction bond: Held—That it is the duty of a

**TUTORS AND TUTORSHIP—Continued.**

- tutrix to protect the rights of her wards, and if, in the accomplishment of that duty, it becomes necessary to execute a judicial bond, she has the right to do so. *Dupré v. Swafford*, 222.
10. Nothing is to be found in the statutes of this State relative to adoption, which, being construed with the various articles of the Civil Code on the subject of tutorship, inclines this court to believe that the Legislature, in permitting the adoption of children, had any intention to abridge the right of a natural tutor to the personal care and control of his minor child or to the administration of the child's property. *Succession of Forstall*, 430.
11. The defense that the note sued on was given in settlement of the claim of the plaintiff against defendant as tutor, when no account had been rendered by defendant to the court, can not be sustained. *Neilson v. Neilson*, 528.
12. The provision of the Code, which requires a tutor to render an account ten days previous to entering into any agreements with his ward, is intended for the protection of the ward, and he alone can take advantage of its disregard. The tutor can not take advantage of his failure to comply with the law. *Ibid.*
13. The allegation that the note was given for two slaves purchased at the tutor's sale of the minor's property, can not be listened to in a court of justice. The tutor can not, in his own defense, be permitted to urge his own dereliction of duty and violation of the laws of his country. Besides, it is in evidence that the price of the slaves was not the consideration of the note sued on. *Ibid.*
14. The execution of the note for the amount ascertained to be due by the tutor did not change the character of the debt. It fixed the amount due and the period when it should be exigible, but it did not distinguish the legal mortgage which the law gave to secure the rights of the ward. Novation is never presumed. *Ibid.*

SEE JURISDICTION. Nos. 9, 10—*Lay v. Succession of O'Neil*, 603.

SEE JUDGMENT, Nos. 33, 34, 35—*Winter v. Touvoir et al.*, 611.

**TRANSFER.**

SEE BILLS AND NOTES—*City of New Orleans v. Strauss*, 50.

SEE MINORS, No. 1—*Seyburn v. Deyris*, 483.

**TRESPASS.**

SEE PRESCRIPTION, No. 11—*Whitehead v. Dugan*, 409.

**TELEGRAPH COMPANY.**

SEE PRESCRIPTION, No. 10—*Lagrange v. Southwestern Telegraph Company*, 383.

SEE CARRIERS, Nos. 2, 3, 4—*Ibid.*

**TRUSTS.**

1. Where defendants received a certain quantity of cotton, sold it, and collected the proceeds of the sale as commission merchants or factors of the plaintiff: Held—That the debt resulting from it is a fiduciary one, and exempted by the insolvent law from its operation. The money was received in trust for the plaintiff. Defendants, by converting it to their own use, rendered themselves amenable to the criminal laws of the State. It can not, therefore, be inferred that the insolvent laws of the State intended to discharge a debtor from such a debt, even if it had not been therein expressly excepted.

*Tate v. Laforest*, 187.

**TAXES AND TAXATION AND TAX SALES.**

1. The statute of 1871, creating additional remedy for embezzlement, breach of trust or fraud, on the part of collectors of taxes, in no manner conflicts with section 1593 of the Revised Statutes of 1870, and the latter is not therefore repealed by the former.

*State v. Doherty*, 119.

2. Where the resistance to the payment of State taxes was founded on the ground that the clerk, sheriff and recorder, before proceeding to make the assessment on which the tax is levied, gave no notice in the official journal of the parish, as required by section forty of the Revenue law, acts of 1871, 116: Held—That the plaintiff's objection rested merely on technical grounds, inasmuch as he had paid voluntarily his parish taxes, which were levied under the same law, by the same parties, upon the same assessment, at the same time and in the same manner in every respect as the State taxes, and had several times promised to pay said taxes; and inasmuch also as he had made in this proceeding no complaint of any error, injury, or injustice in the assessment and levying of the taxes.

*Gag v. Hebert*, 196.

3. The object of section forty of the Revenue law of 1871 is to give the taxpayer notice, that he may have an opportunity to have errors corrected and a just assessment made. Where it is proved that he had such notice, he has no cause to complain.

*Ibid.*

4. There is no prohibition in the constitution against the sale of property for taxes in lots of from ten to fifty acres, or any other quantity. The fact that the constitution directs that all lands sold in pursuance of decrees of courts shall be divided into tracts of from ten to fifty acres, does not inhibit the legislature from directing lands sold under other process to be similarly divided.

*Ibid.*

5. The impracticability of the proceeding prescribed by law and the imposing of the cost thereof upon the purchaser of lands sold for taxes, are not good grounds for an injunction on the part of the

**TAXES AND TAXATION AND TAX SALES—Continued.**

taxpayer. The consequences referred to will rest with the State and the purchaser. *Ibid.*

6. Where a piece of property was bought at a tax sale, the deed for it made out by the sheriff and duly recorded in the office of the recorder of the parish, and said property was seized by a creditor of its former owners, who treated the tax sale as an absolute nullity, and who, being enjoined by said purchaser, proposed in the injunction suit to attack the title by showing irregularities and defects in the proceedings preceding the tax sale: Held—That on its face the title of the purchaser is regular; that he is in possession under a recorded title; that by a special provision of the constitution, article 118, the deed of sale is *prima facie* evidence as to the title; that it is declared valid by section 59 of the act of 1872, No. 42, and that for these reasons the injunction must be maintained. *Coco v. Thieneman et al.*, 236.

7. Where the plaintiff sued for the value of his services in transferring from the other district courts and docketing in the Superior District Court some fifteen hundred tax suits, and obtained judgment in his favor for the sum of fifty cents per suit on all of said suits: Held—That the extra compensation allowed the clerk in this instance was not authorized by law.

*Burk v. City of New Orleans*, 301.

8. Where, instead of procuring and recording, according to law, certified copies of judgments as directed by city ordinance No. 1630, administration series, the plaintiff followed the provisions in section 12 of act No. 73 of 1872, by which a special mode was provided for recording the taxes due to the city without any cost to the city: Held—That if the provisions of this act are resorted to in preparing and inscribing the tax judgments to preserve the lien and mortgage in favor of the city, its provisions in regard to compensation must be enforced. It is only by the terms of this law that the lists or registers prepared by the plaintiff can have effect as a legal inscription. But this inscription was to be made without cost to the city. Outside of this law the said registers or inscriptions of judgments, as made by plaintiff, are without effect. The inscriptions are not made in the books of privileges and mortgages required by the general law on the subject.

*Southworth v. City of New Orleans*, 333.

9. The clerks of courts in the city of New Orleans do not come within the provisions of section 52 of act No. 42 of the General Assembly of 1871 in relation to the assessment and collection of taxes.

*State ex rel. Lynne v. Clinton*, 342.

10. There is no law which requires that the tax bills or receipts shall

**TAXES AND TAXATION AND TAX SALES—Continued.**

be signed by the Administrator of Finance of the city of New Orleans, or that stamps should be affixed to them.

*City of New Orleans v. Crescent Mutual Insurance Company*, 390.

11. It is not necessary that, in the judgment enforcing the payment of the tax bills, there should be specifications separating the amount assessed on real estate from the assessment on merchandise, capital and money at interest. It is sufficient that this should be done in the tax bills on which the judgment is predicated. *Ibid.*
12. It was a sufficient publication, and such as was required by the law, where it was proved that the notices to taxpayers were published at least four times in the New Orleans Republican, to wit: on the twenty-second, twenty-seventh and thirtieth of August, and on the nineteenth of September, 1872. It was not necessary that there should have been further evidence of the ordinances Nos. 1497 and 1498, than there is in the record. *Ibid.*
13. The offering in evidence of the several papers in which the notice of publication was made, and the subsequent filing of them, was sufficient to establish what the law required. *Ibid.*
14. The law relating to city taxes does not require the notices to be published for thirty days. It only declares that no judgment shall be rendered until after thirty days' notice, the notice to be thrice published. *Ibid.*
15. The city ordinances Nos. 1261, 1262, 1272, of December, 1871, do not make the aggregate taxation exceed two per cent., and this objection, so far as these ordinances are concerned, can not be maintained. *Ibid.*
16. The city ordinance of the nineteenth December, 1871, and the ordinance of the thirtieth December of the same year, are not in violation of the act of the sixteenth of March, 1870, section 18, which provides that the Common Council of New Orleans shall, once at a regular meeting in the month of December, and not oftener, in each and every year, lay an equal and uniform tax, etc. *Ibid.*
17. The ordinance of the City Council, seventh May, 1872, levying a third tax in addition to those levied by the ordinances of the nineteenth and thirtieth December, 1871, is not contrary to the statute which provides that taxes shall only be levied once a year in the month of December, because said ordinance rests on the act of the twenty-fourth April, 1872, which authorizes the levying of said tax on an estimate to be made from the tax rolls of 1871. The objection that this act is unconstitutional because retrospective in its effect can not be maintained. *Ibid.*
18. The constructing of levees for the protection of lands subject to overflows is not made at the expense of the State treasury. That

**TAXES AND TAXATION AND TAX SALES—Continued.**

expense is met by a general tax on all the taxable property of the people of the State. The Legislature had the power to impose that tax and to appropriate it as they saw fit. They create no debt which goes beyond the constitutional limitation, and in the acts referring to the general levee tax have violated no provision of the constitution.

*State ex rel. Louisiana Levee Company v. Clinton*, 401.

19. Where the defendant being sued as a defaulting tax collector, his defense was that the State Treasurer illegally refused to receive from him certain State warrants which he alleged he took in payment of taxes: Held—That the defense was not tenable, because at the time the warrants were tendered the Treasurer was enjoined by the Superior District Court from receiving the same, and because said warrants were illegally issued, no appropriation for such purpose having been made as required by article 104 of the constitution, and because the defendant did not, in relation to those warrants, comply with the provisions of section 3337, Revised Statutes.

*State v. Lemarie*, 412.

20. Unless the property within an incorporated town is expressly exempted by law from a parish tax, the general power conferred on the police jury of the parish to assess a tax on all ordinary objects of taxation in the parish will reach such property.

*Maurin v. Smith*, 445.

21. This case is held by the court to be governed by the one of *Campbell v. the City of New Orleans*, 12 An. 34. There is but one difference in point of fact. Campbell paid his taxes without objection or protest, and sought only to recover the amount back after it had been decided in a controversy between another party and the city, that the ordinance under which the assessment was made was unconstitutional. In the present case, the plaintiffs, before making their last payment for taxes, expressly stipulated with the City Treasurer, to whom their money was paid, that it should be returned in case there should be rendered a decision in a certain sense, by the court, in another pending controversy. But they paid, not because they were compelled to pay, but because they chose to pay, and, on the contrary, did not resist payment, as was done in the case upon the decision of which they were content to rest their case.

*Factors and Traders' Insurance Co. v. City of New Orleans*, 454.

22. The stipulation by plaintiffs with the City Treasurer amounted to nothing, for it was not shown that he had authority to make the contract.

*Ibid.*

23. There was an unquestionable, natural obligation on the part of plaintiffs to bear their quota of the expenses of carrying on the

**TAXES AND TAXATION AND TAX SALES—Continued.**

- municipal government of the city of New Orleans. The plaintiffs have enjoyed all the advantages and protection of that municipal government. To return to them the money which they have paid in consideration of these advantages, would be to give them the protection which they required for their persons and property, and make their fellow citizens pay for it. *Ibid.*
24. The law under which plaintiffs paid their taxes was in full force and vigor at the time. It is a fallacy to contend that it never had any life because it was unconstitutional. *Ibid.*
25. Where plaintiff, whose property, as he claimed, was seized by virtue of a judgment in the suit of *Marcy v. McKinney*, enjoined said execution and excepted to the right of defendants and intervenor to thus attack his title collaterally, but averred that they must do so by a direct revocatory action contradictorily with all the parties to the tax sales at which he acquired the property, and further excepted that they had neither alleged nor suffered any injury by said sales: Held—That the court *a qua* erred in maintaining the exceptions of plaintiff to the right of the intervenor and defendants to contest the validity of the tax sales under which plaintiff holds. *Dupre v. Thompson*, 503.
26. Section 11 of act 81 of the regular session of 1872, promulgated on thirteenth April, 1873, does not violate, as alleged, the uniformity and equality of taxation, because it exempts some property and persons in the town of Monroe, within the limits of the parish of Ouachita, from taxation to which other inhabitants of the parish are subject, and because the Legislature can only exempt "property actually used for church, school and charitable purposes." *Whited v. Lewis*, 568.
27. The power to tax property within the parish of Ouachita and require licenses from the inhabitants thereof, was conferred by the Legislature on the police jury, and the exercise of that power is only curtailed by the section of the law which exempts the town of Monroe. *Ibid.*
28. The Legislature conferred the power of taxation on each subdivision of the local government—the police jury of the parish and the municipal authorities of the town of Monroe—and had the right to withdraw or modify that delegation as to each or both. The act was not retroactive. It merely withdrew a delegated power which had not yet been exhausted, and destroyed no vested right in the police jury. *Ibid.*
29. The tenth clause of section 1 of act No. 14 of the acts of 1872 is not unconstitutional, because it levies a tax of eighty-five dollars on persons dealing in distilled liquor, or retailing spirituous liquors on land, while a tax of only fifty dollars is levied on persons fol-

**TAXES AND TAXATION AND TAX SALES—Continued.**

lowing a like occupation on steamboats, although they may only ply within the limits of a single parish of the State.

*Kaliski v. Grady*, 576.

30. Retail dealers are those who keep an open shop and who sell provisions and liquors in small quantities. C. C. 3208. A wholesale dealer is a person who sells by packages. A man may be both a wholesale and retail dealer. He is a wholesale dealer when he sells parcels of goods in packages, as, for instance, ten barrels of flour or whiskey, or whiskey and flour by the barrel, or one or more sacks of coffee, or bolts of goods, at the same time, and to the same party. He is a retail dealer when he sells flour by the pound, whiskey by the gallon or bottle, dry goods by the yard. He is both a wholesale and retail dealer when he sells all such articles by the package or by the pound indifferently.

*Flournoy & Millsaps v. Grady*, 591.

31. Each proviso, the one in section 15 of act No. 42, approved March 3, 1871, and the other in section 15 of act No. 14, approved March 5, 1872, refers simply to the license tax, and not to taxation on the property, capital, etc., of insurance companies.

*City of New Orleans v. Salamander Insurance Company*, 650.

32. Under the act of 1871, the payment of \$1000 as a license, and of one per centum on the premiums earned from policies issued through agencies in the State, in addition to said license, will exempt the company from any other license for doing business throughout or in any part of the State—the one per centum being considered sufficient from the agencies in the State, and the \$1000 from the mother company.

*Ibid.*

33. The act of 1872 treats only of the subject of licenses, and is limited to that only.

*SEE CONSTITUTION AND CONSTITUTIONAL LAW*, Nos. 20, 21, 22—

*State ex rel. Blakemore v. Graham*, 625.

**WARRANTY.**

1. Where a certificate of indebtedness, with the date and number wanting, was stolen, while being prepared for issuance, before it was issued and put in the market by the city of New Orleans, and after the date and number had been subsequently forged was sold to the defendant, who called his vendor in warranty: Held—That this instrument can not be classed as negotiable paper upon which the maker is bound to innocent holders. It is transferable, it is true, but the transferee obtains only the rights of the transferreer.

*City of New Orleans v. Strauss*, 50.

2. In this case the transferrers and warrantors had no legal possession of the certificate of indebtedness of which the city of New Orleans never ceased to be the owner.

*Ibid.*

3. There is no ground for a call in warranty in a case of trespass, and hence there is no right of action against warrantors.

*Coco v. Hardie*, 230.

**WAGES.**

SEE PRIVILEGE, No. 6—*Radowitch v. Seward*, 315.

**WITNESS.**

1. Where the objection to the validity of a will was, that the person who wrote and read it was not designated therein as a witness, but as a notary: Held—That there is no law which declares that a man, because he is a notary public, is not a good witness to a will, and there can be seen no reason why he should not be.

*Succession of Payne*, 202.

SEE CRIMINAL LAW AND PRACTICE, No. 18—*State v. Prudhomme*, 522.

**WALLS IN COMMON.**

1. Where defendant was sued for half the value of a wall, which said defendant made a wall in common by using it to support his buildings: Held—That he had no interest to question plaintiff's title further than to ascertain whether the claim demanded could safely be paid to the claimant. *Irwin v. Peterson*, 300.
2. The question whether the relator in this case had, as owner of an urban lot of ground, the right to build a wall or fence on her own property for her own profit and convenience, involves a larger interest than the five hundred dollars damages claimed by her next neighbor as resulting from the erection of said wall or fence, and therefore a suspensive appeal lies to this court from a judgment rendered against relator. It is a question concerning the ownership of property and its enjoyment, and may involve the entire value of the property on which the wall or fence is built.

*State ex rel. D'Arcy v. Judge of the Fourth District Court, parish of Orleans*, 621.

**WILLS AND TESTAMENTS.**

1. The subject matter of this suit is purely probate in its character, to wit: the revocation of the probate of a will, and the suit was properly brought, under the circumstances of the case, in the probate court which had made the order to record and execute the will. *Fuentes v. Gaines*, 85.
2. An *ex parte* order admitting a will to probate is not a judgment binding upon those who are not parties to the proceeding. The *ex parte* order for the recording and execution of the will is a preliminary proceeding for the administration of an estate, if not a final judgment which concludes every one. It is a mere license to authorize the executor or heir to carry out the provisions of the testament; and the verity and validity of the will must be established whenever questioned by third persons from whom property is judicially demanded under the will. *Ibid.*
3. Article 3542, Civil Code, refers to actions for the nullity of testaments when the instituted heir is in possession of property under

**WILLS AND TESTAMENTS—Continued,**

the will, and is sued by the heirs at law to annul the will and to take from the instituted heir the property. It does not apply to a case in which the defendant in a chancery suit is obliged to come to the probate court to establish a part of his defense in consequence of the limited jurisdiction of the Circuit Court of the United States. *Ibid.*

4. The validity of a probated will is immaterial to third parties until they are disturbed under it in the possession of their property, and prescription against them could not begin to run until the cause of action had arisen; nor can prescription run against one in possession. *Ibid.*
5. Where a will, when last seen, was in the possession of the testator, and it could not be found at his death, the presumption of the law in such a case is, that the testator destroyed it *animo cancellandi*, and the *onus* of rebutting this presumption is cast upon those seeking to establish the will. The opinions or suspicions of a witness can not overcome the presumption raised that the testator himself destroyed the will. *Ibid.*
6. The contents of a lost will can not be proved by witnesses who derived their knowledge from the verbal declarations of the testator. It would practically authorize the making of a verbal testament, and a lost testament could thus be proved by evidence which would be incompetent to prove the will if produced in court. *Ibid.*
7. It is necessary to prove that a lost holographic will contains all the essentials prescribed by law before it can be admitted to probate, to wit: That it was wholly written, dated and signed by the testator, and the witnesses must state the facts which are necessary to enable the court to determine whether or not the will is valid. *Ibid.*
8. It is essential to specify the day, month and year to give a date to a testament in the sense of article 1588 of the Civil Code. *Ibid.*
9. The facts required to be established by article 1655 Civil Code for the probating of an holographic will must be proved by competent testimony, and can not be inferred by the court. *Ibid.*
10. Where plaintiff was not an heir: Held—That she had no right to attack a will in so far as it related to the disposal made by the testator of his property, but that she might sue to annul it in so far as it interfered with her rights to have the tutorship of her grand children. *Succession of Payne*, 202.
11. It is unnecessary to decide the question raised whether a testament is valid as a will by nuncupative public act, when it is good as a nuncupative will under private signature. *Ibid.*
12. Where the objection to the validity of such a will was, that the

**WILLS AND TESTAMENTS—Continued.**

- person who wrote and read it was not designated therein as a witness, but as a notary: Held—That there is no law which declares that a man, because he is a notary public, is not a good witness to a will; and there can be seen no reason why he should not be. *Ibid.*
13. A will can be set aside only when the law itself pronounces it to be null on account of the want of compliance with those formalities which are declared to be sacramental. *Ibid.*
14. Where A was appointed by will tutor to minors, and at the same time the testator declared that the care, management and raising of his children should be left in the hands of Miss B: Held—That this was not appointing her tutrix; that this was merely giving her the personal care of the children, whilst the legal control of the persons and property of the minors was vested in A, who could as tutor, when he chose, remove them from her care. *Ibid.*
15. In 1860, Manette Dubreuil died. Her estate consisted of the undivided half of a certain real estate, standing in the name of Charles Beebe, deceased. Manette Dubreuil had no legal heirs. Luke Beebe was her natural son, duly acknowledged and recognized as such by a judgment of the Second District Court of the parish of Orleans. In 1870, said Luke Beebe got judgment in his favor against the executor of Charles Beebe to recover one-half of said property. In 1871, the children of a predeceased natural child of Manette Dubreuil caused her will to be probated. These grandchildren and Luke Beebe were by said will made universal legatees; and the testatrix further declared that she acknowledged owing her son Luke a certain sum of money he had advanced to her for her benefit, and which she wished to be paid to him, with a certain rate of interest. The grandchildren and universal legatees, who are the contestants in this case against Luke, maintained that the passage of the testament above referred to was only the acknowledgment of a debt and not a legacy, and pleaded prescription: Held—That it constituted a remunerative legacy; that the succession of Manette Dubreuil was an irregular succession; that representation is not admitted in such successions, except in the case of the succession for a natural child; that until the will of Manette Dubreuil was probated, Luke Beebe was the sole heir of the deceased; that, as such, he had no right to sue the estate, or to make a demand for payment of a debt due to him, as such debts are extinguished by confusion; that when the will was produced and probated, Luke Beebe ceased to be the sole heir; that his right as creditor became exigible, and that until then prescription did not begin to run.

*Succession of Manette Dubreuil, 370.*

**WILLS AND TESTAMENTS—Continued.**

16. The argument that a testamentary disposition in favor of Mason county court, Kentucky, is immoral, and therefore null, because the legacy is to be applied to the support of indigent illegitimate children under seven years, and their indigent mothers, is not considered worthy of serious consideration.

*Succession of Milton Taylor*, 446.

17. Where the formalities required by Art. 1578 Revised Code, were not complied with, a will is not good as a nuncupative testament by public act, nor can it be held good as a nuncupative will by private act, when the proof adduced fails to show that the formalities required for it have been observed.

*Thibodeaux v. Voorhies*, 478.

18. Where a will was made in these terms: "At home, March 4, 1870. I this day make my will. I want my wife to keep and maneg all my estate both reil and persenal deuren her lif time and be Lowed to sell eny of the land for not less than the apprasment and I apoint my wife administrator: Held—That said will contains no substitution and no *fidei commissum*, which are never to be presumed; that the words of a will, like those of a law, are generally to be understood in their most usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the words; that said will, construed by these rules, means that the testator intended to give the usufruct of his estate to his wife, and is valid.

*Hasley et al. v. Hasley*, 602.

19. Express mention must be made in the nuncupative will by public act that the witnesses were present at the time it was received by the notary and dictated by the testator, otherwise the instrument does not conform to the requirements of article 1578 of the Revised Code, and is therefore void.

*Conner v. Brasher*, 663.

20. That the witnesses came with the testator to the office of the notary and were present when the will was read to him, is not sufficient. This might be strictly true, and yet the witnesses might not be present at the dictating and writing of the testament.

*Ibid.*

